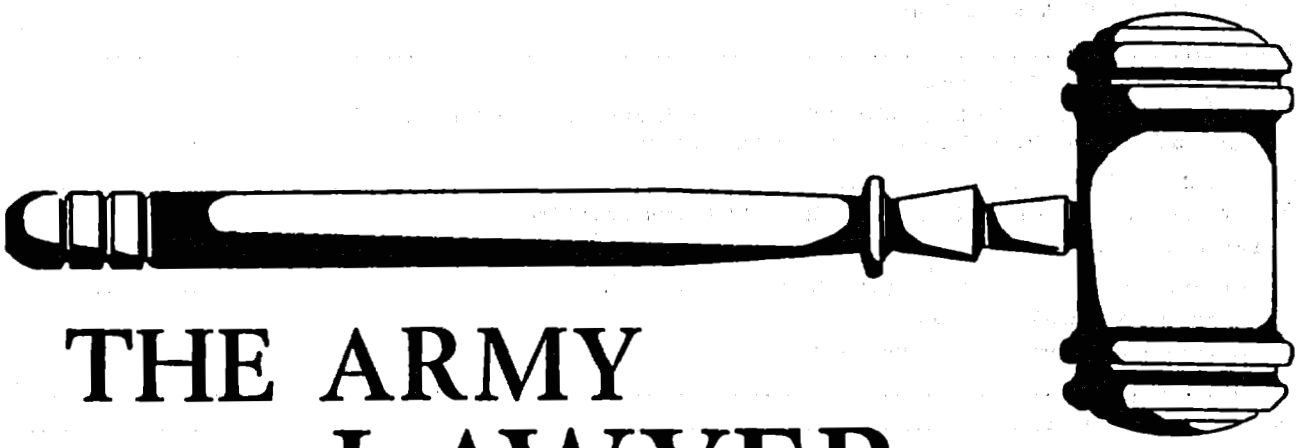

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Debt Collections on Behalf of Nonappropriated Fund Instrumentalities

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Introduction

Debt collection on behalf of nonappropriated fund instrumentalities (NAFIs) is of enormous importance in these times of diminishing appropriated fund support for morale, welfare, and recreation (MWR) activities. It is particularly important in light of the House Armed Services Committee's exhortations to "operate MWR activities in a businesslike manner."[1] Moreover, NAFIs cannot consider patron indebtedness as an imaginary or insignificant problem as long as they operate like their civilian counterparts. For example, in 1989, the combined annual dollar loss for the Fort Rucker Noncommissioned Officer (NCO) and Officers' Club delinquent account exceeded $28,000. In addition, the magnitude of the NAFI patron indebtedness problem is evidenced by the Army's applying for $185,955.68 in federal tax refund offsets from the Internal Revenue Service (IRS) in calendar year 1989. Patron indebtedness, therefore, poses a substantial burden on the financial livelihood of Army MWR activities. Installation NAF managers, however, may employ several procedures to obtain the payment of debts from present and past patrons. The purpose of this article is to provide installation judge advocates with a brief synopsis of the legal tools available to NAFIs in their collection efforts against their debtors.

Specific Offset Statutes

The Debt Collection Act of 1982[2] (DCA) provided federal agencies with an effective method to collect their debts. The salary offset and the administrative offset[3] provisions of the DCA provide generalized authority to collect debts owed to the United States. Under the salary offset provisions of the DCA, federal agencies may deduct up to fifteen percent of the disposable pay of soldiers—including members of the Reserves—and civilian employees who are indebted to the United States. Similarly, the administrative offset provisions of the DCA permit federal agencies to reconcile debts by offsetting monies that otherwise would be payable to agency debtors. Administrative offsets commonly include reimbursements for government travel and benefits checks. Unfortunately the DCA does not apply to debts owed to a NAFI, because these debts are not considered debts owed the United States.[4]

Another idiosyncracy of the offset provisions of the DCA is that they apply only in the absence of a specific statute authorizing offset.[5] Accordingly, federal laws that specifically provide for salary and administrative offset effectively prevent an agency from invoking the general authority to offset monies provided in the DCA. The ability to employ the DCA only in the absence of other means of recourse is especially significant in debt collections against soldiers because a specific statute—section 1007 of title 37, United States Code[6] (U.S.C.)—authorizes the collection of debts owed by service members to the Department of Defense (DOD), its instrumentalities, and other uniformed services. In general, this statute allows an agency which has determined administratively that a member of the uniformed services owes any amount to the United States or any of its instrumentalities[7] to deduct that amount from the member's pay in monthly installments.[8]

Collecting soldiers' debts through 37 U.S.C. section 1007, rather than through the DCA, not only is the law, but also is DOD policy.[9] This policy, however, does not foreclose the use of the DCA in all situations. The exceptional circumstances, however, under which an agency may subject a service member to the salary offset provisions of the DCA, rather than to the provisions of 37 U.S.C. section 1007(c), are beyond the scope of this article.

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[1] H. Rep. No. 110-563, 100th Cong., 2d Sess. 197 (1988).

[2] Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (codified in scattered sections of titles 5, 18, 26, 28, 31, and 37 U.S.C.).

[3] *Id.* § 10 (codified at 37 U.S.C. § 3716 (1988)); *id.* § 5 (codified at 5 U.S.C. § 5514 (1988)).

[4] Army Reg. 37-1, Financial Administration: Army Accounting and Fund Control, appendix F-1d (1 Oct. 89) [hereinafter AR 37-1].

[5] The provisions of 5 U.S.C. § 5514 and 37 U.S.C. § 3716 do not apply to any case in which collection of a debt by offset is explicitly provided for or prohibited by another statute. For example, these exceptions include travel advances under 5 U.S.C. § 5705 and employee training expenses under 5 U.S.C. § 4108. *See* 64 Comp. Gen. 142, 146-47 (1984).

[6] 37 U.S.C. § 1007 (1988).

[7] The definition of "instrumentalities" is broad and includes service relief societies such as Army Emergency Relief (AER). *See id.*

[8] *Id.* § 1007(c).

[9] Dep't of Defense, Military Pay and Allowances Entitlements Manual, para. 70703 (9 Mar. 1987).

Section 1007 allows service finance centers to deduct a portion a soldier's pay to satisfy debts that the soldier owes to the United States *or any of its instrumentalities.* Conversely, 5 U.S.C. section 5514[10] and 37 U.S.C. section 3716[11] allow salary and administrative offset, respectively, from a civilian employee's salary for debts owed *to the United States only.* Consequently, while a NAFI may collect a soldier's indebtedness involuntarily, it may not collect debts owed to it from civilian employees because NAFI debts are not debts owed "to the United States."[12]

Collecting NAFI Debts Owed by NAFI Employees

NAFI employees are not federal employees.[13] Therefore, agency regulations that cover the management of NAFIs specify the procedures for imposing salary and administrative offsets against NAFI employees.[14] For instance, in the Army NAF system, a NAFI can recover debts owed by its employees through biweekly payroll deductions.[15] The NAFI may take these deductions against the employee's wages and his or her accumulated leave.[16] The collections, however, may commence only after the NAFI has accorded its employee basic due process protections.[17]

Collecting NAFI Debts Owed by Civilian Employees

Unfortunately, no statute currently fills this void by allowing an agency to use salary or administrative offset against an *appropriated fund (APF) civilian employee* for debts the employee has incurred in favor of a NAFI. Various alternative methods, however, permit agencies to recoup sums that APF civilian employees, as well as other debtors outside the reach of statutory offset provisions,[18] owe to NAFIs. The alternate methods are not as quick and sure as an offset action, and they do not apply to every category of debtors. Nevertheless, in most situations, some, if not all, should prove to be highly effective either in actually collecting the debt or in persuading individuals—through incentives or deterrents—to liquidate their debts voluntarily. These alternate methods, and explanations on how NAFI managers and military legal practitioners can employ them, appear below.

Job Action

Army Regulation (AR) 600-50[19] states that Department of the Army (DA) personnel will pay their just financial obligations in a proper and timely manner.[20] AR 600-50 is a punitive regulation. Accordingly, penalties for violating this standard include the full range of statutory and regulatory sanctions. For instance, a civilian employee may be reprimanded, suspended, or removed for willful violations of administrative rules and regulations.[21] Likewise, willful violations of AR 600-50 may subject soldiers and NAF employees to either criminal or adverse administrative actions.[22] Although these actions cannot recover a debt directly, reminding an employee that he or she may be subject to these sanctions often will be enough to encourage the employee to pay an outstanding debt.

Use of Private Collection Agency

31 U.S.C. section 3718[23] authorizes agencies to contract for debt collection services. Accordingly, DOD has informed all of its components that they could use commercial collection agencies for collection services to supplement their collection programs.[24] The issue that naturally arose in NAFI circles is whether 31 U.S.C. 3718 authorized NAFIs to contract for collection services to recover indebtedness owed them. Congress, however, passed 31 U.S.C. section 3718 in 1983 as part of a larger

---

[10] 5 U.S.C. § 5514 (1988).

[11] 37 U.S.C. § 3716 (1988)

[12] NAFI debts cannot be collected under 5 U.S.C. § 5514 because they are not considered debts to the United States. *See* AR 37-1, appendix F-1d. The administrative offset provisions of 37 U.S.C. § 3716 are likewise inapplicable because those provisions also are employed to collect debts due to the United States. The IRS Refund Offset Program and Address Request Program, however, clearly are applicable because they specifically list federal agencies and instrumentalities as authorized users. *See infra* notes 27-35 and accompanying text.

[13] 5 U.S.C. § 2105(c) (1988).

[14] AR 37-1, appendix F-1d.

[15] *See* Army Reg. 215-5, Morale, Welfare, and Recreation: Nonappropriated Fund Accounting Policies and Reporting Procedures, para. 8-19 (10 Oct. 1990).

[16] *See* Army Reg. 215-3, Morale, Welfare, and Recreation: Nonappropriated Funds and Related Activities Personnel Policies and Procedures, para. 3-2*h* (10 Oct. 1990) [hereinafter AR 215-3].

[17] *See* Army Reg. 215-1, Morale, Welfare, and Recreation: The Administration of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities, para. 14-5*f* (10 Oct. 1990).

[18] These other debtors include former NAFI employees who no longer are employed by a NAFI and for whom the NAFI holds no monies that could be subject to administrative offset in satisfaction of the debt.

[19] Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel (28 Jan. 1988) [hereinafter AR 600-50].

[20] *Id.* para. 2-8.

[21] *See* Army Reg. 690-700, Personnel Regulations and Services (General), chap. 751 (IO5, 15 Sept. 1987).

[22] *See* AR 600-50, para. 1-1.

[23] 31 U.S.C. § 3718 (1988).

[24] *See* Dep't of Defense Instruction 7045.18, Collection of Indebtedness Due the United States (Mar. 13, 1985).

revision of federal law concerning the collection of *government* debts only; it therefore does not affirmatively authorize the collection of debts owed to government *instrumentalities*.

On the other hand, Army regulatory provisions do not affirmatively prohibit Army NAFIs from using commercial debt collectors. Specifically, AR 215-1, which enumerates prohibited uses of NAFs, does not prohibit NAFIs from contracting for private debt collecting.[25] Consequently, a NAFI may hire a commercial debt collection agency if it believes that the arrangement will facilitate its debt collection program. Practitioners should note, however, that certain provisions of the Fair Debt Collection Practices Act,[26] as well as many state laws, limit the activities of private debt collectors. Therefore, if the amount of the indebtedness in question is not very substantial, the NAFI may find that issuing its own collection letters is more economical than hiring an outside firm. NAFI managers can use private collection agency services against all categories of debtors.

IRS Income Tax Refund Offset

31 U.S.C. section 3720A[27] allows any federal agency, including NAFIs, to whom an individual owes a past-due, legally enforceable debt, to notify the Secretary of the Treasury of that debt. The Secretary may then reduce the amount owed from any amounts due to the debtor from tax refunds. Of course, the success of this method depends on whether or not the debtor is entitled to a refund of federal taxes. Additionally, the agency and the United States Treasury must satisfy a myriad of procedural requirements before the Secretary can approve the offset.[28] Defense Department regulations, moreover, prohibit DOD agencies from pursuing tax refund offsets against a debtor in cases in which the agency legally can invoke the salary offset provisions.[29] The United States Army Community and Family Support Center (USACFSC) has published guidance on submitting information for the Army NAF income tax refund offset program.[30] Adhering to the published guidance is necessary because Army NAF claims are consolidated by USACFSC in Alexandria, Virginia, for forwarding to the United States Army Finance and Accounting Center (USAFAC). USAFAC, at Fort Benjamin Harrison, Indiana, then incorporates the claims into the Army's annual global submission to the IRS. To qualify for the income tax return offset program, the delinquent debt must meet the following criteria:

a. The debt must be for at least twenty-five dollars;

b. The debt must be at least ninety days old, but no more than ten years old;[31]

c. The debt must not be eligible for collection by salary offset;[32] and

d. The debt must be valid and legally enforceable.[33]

Each eligible claim must be submitted to USACFSC on a separate copy of a USACFSC form entitled "Referral of Debt Due the United States for IRS Tax Refund Offset Program." USACFSC includes this form in its annual information memorandum on the income tax refund offset program sent to the Army major commands. The form must be certified by the chief of the installation Community Activities Financial Management Division or the chief's immediate supervisor. Claims that are not certified properly will not be included in the program. To answer inquiries from debtors promptly and efficiently, a copy of the documentation supporting the validity of the claim must be attached to the form. Forms must be received at USACFSC by 1 May for inclusion in the calendar-year cycle. Earlier submission is preferred.

Once validated, claims submitted to USACFSC will be purchased at a percentage of face value by the Army Morale Welfare and Recreation Fund (AMWRF). The percentage will be adjusted after review of collection experience and administrative expenses. Once the debt is transferred to the AMWRF, it will not revert to the NAFI. Accordingly, any offset resulting from the claim will be income to the AMWRF.

The payout to NAFIs under the IRS Refund Offset Program is low. Therefore, the program is suitable only for delinquent debts that cannot be collected through other procedures. This program should be viewed by financial managers as a method of last resort. Accordingly, NAFI managers should make every effort to contact debtors and give them the opportunity to pay back their debts before

---

[25] AR 215-3, para. 3-15.

[26] *See* 15 U.S.C. § 1692-1962o (1988).

[27] 31 U.S.C. § 3720A (1988).

[28] 31 C.F.R. part 5 (1990).

[29] 32 C.F.R. part 90.6 n.4 (1989).

[30] *See* Memorandum, HQ, Dep't of Army, DACF-RM, 23 Mar. 1983, subject: Instructions for Submitting Army NAF Delinquent Debts for Collection Using the IRS Income Tax Refund Offset Program [hereinafter Memorandum]. USACFSC points of contact are Ms. Judy Perso and Ms. Christel Schaefers, CFSC-RMB-B, autovon 221-8780 or commercial (703) 325-8780.

[31] *See* 31 U.S.C. § 3716(c) (amending six-year statute of limitations, but only for purposes of administrative offset actions). Even though a tax return offset is cognizable for up to ten years under the USACFSC's guidance, the statute of limitations still would bar a law suit if initiated after the sixth year.

[32] *Cf.* 31 U.S.C. § 1007 (1988). Because they can be collected by salary offset, the debts of active duty military members cannot be submitted.

[33] *See* Memorandum, *supra* note 30.

their claims are referred to the IRS under the tax Refund Offset Program.

Taxpayer Address Request Program

The Taxpayer Address Request Program, also known as IRS Project 719,[34] is the IRS's locator service. It is used to obtain the most recent tax address of a debtor when other attempts to locate the debtor have been unsuccessful. NAFIs may use the program; however, they may access its services only through USACFSC.[35] Just like the IRS Refund Offset Program, the locator service is administered centrally for all Army NAFIs by USACFSC and agency users must satisfy specific procedural requirements before access is granted.

A Judicial Remedy Against the "Untouchable" Category of Debtors

One category of NAFI debtors is comprised of individuals with whom the sponsoring agency has no ties, and to whom the agency and the NAFI owe no money subject to offset. The Army defines these "untouchables" as "other persons."[36] Collections of indebtedness against so-called untouchable or "other" persons, including commercial entities, are processed as claims in favor of the United States under AR 27-40.[37]

Based upon the characterization of these debt collections as claims, at least one installation has taken a hybrid and innovative approach to the collection of NAFI debts. Specifically, Fort Rucker, Alabama, collects delinquent Installation Morale, Welfare, and Recreation Fund (IMWRF) accounts both by invoking the standard procedures described earlier in this article[38] and by commencing federal lawsuits.

Conclusion

A NAFI such as a community, officer, or NCO club will have various categories of patrons—active duty soldiers, retired soldiers, APF civilian employees, NAF civilian employees, certain dependents or family members, and occasionally the general population—all of whom are potential debtors. As this article has demonstrated, the DCA is a powerful tool for collecting funds owed to the United States. Unfortunately, it does not apply to the collection of debts owed a NAFI. Financial managers, however, have effective alternatives for collecting monies that different categories of patrons owe to a NAFI.

APPENDIX

Summary of Debt Remedies by Category of Debtor

1. *Soldiers.*

a. 31 U.S.C. section 1007(c).

b. Command or administrative action for violating standards of conduct under AR 600-50.

c. Use of private collection agency.

d. IRS Refund Offset Program.

2. *Civilian APF Employees.*

a. Job action for violating standards of conduct under AR 600-50.

b. Use of private collection agency.

c. IRS Refund Offset Program.

3. *NAF Employees.*

a. Salary and administrative offsets under the provisions of AR 215-3 and AR 37-1.

b. Job action for violating the standards of conduct under AR 600-50.

c. Use of private collection agency.

d. IRS Refund Offset Program.

4. *General Public.* This Category is comprised mostly of former, non-retired, APF and NAF employees and guests of authorized patrons.

a. Use of private collection agency.

b. IRS Refund Offset Program.

c. IRS Address Request Program.

d. Claim in favor of the United States under chapter 5 of AR 27-40.

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[34] 26 U.S.C. § 6103(m)(2) (1988).

[35] Practitioners having questions about accessing the IRS Address Request Program should direct them to USACFSC, ATTN: CFSC-RMB-B, Alexandria, Virginia 22331. USACFSC points of contact are Ms. Perso and Ms. Schaefers. *See supra* note 30 (telephone numbers).

[36] *See* AR 215-1, para. 14-5*g*.

[37] *See* Army Reg. 27-40, Legal Services: Claims, chap. 5 (2 Dec. 1987) (Litigation of Medical Care and Property Claims).

[38] *See supra* notes 13-37 and accompanying text.

Perjury During an Agency Board Proceeding

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The set of instructions given to deponents prior to commencing a deposition related to an agency board proceeding often includes language such as, "should you knowingly answer untruthfully you may be subject to criminal prosecution for perjury." Despite this type of warning and the possibility of criminal sanctions, the unique characteristics of agency board proceedings frequently has forced the United States to exercise restraint in taking action against individuals who allegedly have lied during a deposition. In particular, the United States never had prosecuted a deponent for perjury before the Armed Services Board of Contract Appeals (ASBCA) until last year.

On 9 January 1990, however, in the case of *United States v. Hobbs*,[1] the Department of Justice, with the support of the Department of the Army, obtained a conviction against a former supervisor of E-Systems, Inc. for the false testimony she gave during an ASBCA deposition. The purpose of this article is to alert agency counsel to the unique legal issues raised by a deponent's providing false information before an agency board proceeding and to assist counsel in preparing a criminal prosecution against a deponent for perjury when appropriate.

Background

The testimony at issue in *Hobbs* was given pursuant to an ASBCA appeal brought by the deponent's former employer, E-Systems, Inc. The appeal challenged the Army's default termination of two contracts for the production of the VRC-12 radio. During the discovery phase of that litigation, the Army uncovered evidence that company supervisors had directed employees to falsify contractually required test and production data sheets.[2] Because of this evidence, the Army's counsel deposed the supervisor, Sadonna S. Hobbs, during which counsel and Ms. Hobbs exchanged the following questions and answers:

Q: Did you ever instruct individuals to do certain tasks on evenings, weekends, or at other times that government personnel were not located in the facility, because those tasks might not comply with the appropriate work instructions?

A: *To my knowledge, no, I did not, sir.* (emphasis added).

* * *

Q: Do you have any recollection of ever telling anybody not to annotate a correction of product or a problem with product on a [Unit Performance Record], but to repair and then to pass it along the line?

A: *Not to my knowledge. No, I have not, sir.* (emphasis added).

* * *

Q: Do you have knowledge of people making incorrect entries on [Unit Performance Records] or not reporting defects when they were observed?

A: *Not to my knowledge, sir.* (emphasis added).

During the course of discovery, however, the government obtained other evidence which clearly demonstrated that Ms. Hobbs' responses actually were false. Based on that evidence, Hobbs was indicted and subsequently convicted of three counts of perjury and one count of obstructing an agency proceeding. The federal judge later sentenced Ms. Hobbs to four concurrent sixteen-month prison terms.

Hobbs' attorneys raised certain defenses that related uniquely to a prosecution for perjury and criminal obstruction arising from an agency board proceeding. The two principal issues raised by these defenses were: (1) whether or not the defendant actually was under an oath authorized by a law of the United States during the deposition; and (2) whether or not an ASBCA deposition constituted a "proceeding" as defined by federal law. To understand the significance of these issues, the federal criminal perjury and obstruction statutes under which Ms. Hobbs was charged are discussed below.

---

[1] No. 89-230-CT-T-13(A) (M.D. Fla. Jan. 9, 1990) (unpublished).

[2] In October 1990, E-Systems, Inc. pleaded guilty to two counts of conspiracy to defraud the United States and one count of submitting false claims in relation to this conduct.

Perjury Under 18 U.S.C. Section 1621

Perjury occurring during an ASBCA deposition may be charged under section 1621 of title 18, United States Code (U.S.C.), which is entitled "Perjury Generally."[3] Under that section, the government must allege and prove four elements:

> (1) Defendant took an oath, authorized by a law of the United States, to testify truthfully;
>
> (2) the oath was taken before a competent tribunal, officer or person;
>
> (3) Defendant willfully made a false statement contrary to that oath; and
>
> (4) the false statement was material to the proceeding.[4]

The indictment in the *Hobbs* case charged that the defendant had testified untruthfully during a deposition taken pursuant to ASBCA Rule 14(b). Ms. Hobbs, however, challenged the indictment by arguing, *inter alia*, that the ASBCA rule was not a "law of the United States." Accordingly, she moved the court to find the indictment—which was based on a deposition taken pursuant to an agency *rule*—insufficient because it failed to allege an essential element of the crime.[5]

The government responded by noting that the phrase "law of the United States" as used in 18 U.S.C. section 1621 includes regulations that lawfully are authorized and have a clear legislative basis.[6] In the *Hobbs* case, the ASBCA rule—which authorized the taking of the oath at issue—appears in the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS).[7] The Department of Defense promulgated the DFARS pursuant to 5 U.S.C. section 301,[8] which states in pertinent part that:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

Accordingly, the government essentially argued that because the ASBCA rules of procedure are part of the DFARS, they derive directly from statutory authority.

In addition to 5 U.S.C. section 301, the Contract Disputes Act,[9] which established agency boards of contract appeals[10] and authorized the issuance of rules of procedure,[11] provides additional legislative authority for the promulgation of the ASBCA rules. In the interest of providing uniform rules of procedure for all agency boards, Congress directed the Office of Federal Procurement Policy (OFPP) to draft guidelines that the various boards subsequently could adopt as regulations.[12] On May 31, 1979, the OFPP issued the "Final Uniform Rules of Procedure for Boards of Contract Appeals Under the Contract Disputes Act of 1978."[13] On July 1, 1979, pursuant to 5 U.S.C. section 301, the Department of Defense promulgated ASBCA rules as drafted by the OFPP.

After asserting that the subject ASBCA rules of procedure were not "laws of the United States," the defendant contended that the circumstances under which she was deposed did not satisfy the second element of perjury under 18 U.S.C. section 1621. In particular, Ms. Hobbs asserted that the state licensed notary public who had administered the oath was not a "competent officer"

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[3] 18 U.S.C. § 1621 (1982) provides, in pertinent part:

> Whoever having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, ... willfully and contrary to said oath states or subscribes any material matter which he does not believe to be true ... is guilty of perjury.

Prior to enactment of the Organized Crime Control Act of 1970, 18 U.S.C. § 1623, this statute was the exclusive avenue for charging perjury occurring before any federal tribunal. Section 1623 was created to facilitate prosecutions for perjury occurring before federal courts and grand juries, and applies strictly to those forums. *See* Dunn v. United States, 442 U.S. 100 (1979). Since the enactment of section 1623, the volume of case law that specifically addresses 18 U.S.C. § 162 has diminished. Cases interpreting section 1623, however, will have precedential value under section 1621 for common elements. *See* United States v. Lighte, 782 F.2d 367 (2d Cir. 1986).

[4] *See* United States v. Hvass, 355 U.S. 570 (1958); United States v. Debrow, 346 U.S. 374 (1953).

[5] *See* Hagner v. United States, 285 U.S. 427 (1932) (distinguishing between "law" of the United States and administrative "rule").

[6] *See Hvass*, 355 U.S. at 570; United States v. Morehead, 243 U.S. 607 (1917).

[7] *See generally* 48 C.F.R. chap. 2, app. A, para. 14(b) (1990). Section 14(b) provides:

> After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery.

[8] *See* 48 C.F.R. 101 (1990) (Statement of Authority).

[9] 41 U.S.C. §§ 601-613 (1982).

[10] *Id.* § 607(a)(1).

[11] *Id.* § 607(h).

[12] *See* Office of Federal Procurement Policy Act, Pub. L. No. 95-563, § 8, 92 Stat. 2385 (1978) (codified at 41 U.S.C. §§ 401-420 (1982)).

[13] *See* 1984 B.C.A. (CCH) ¶ 101, at 1011.

within the meaning of that statute because she had not been designated specifically by a federal statute or a validly promulgated departmental rule.

ASBCA Rule 14(b), however, specifically provides that oral depositions may be taken "before any officer authorized to administer oaths at the place of examination."[14] In the *Hobbs* prosecution, the deposition in question had been taken in Tampa, Florida, before a notary public duly licensed to administer an oath under the laws of that state.[15] Accordingly, the government contended that the notary was a "competent person" authorized to administer the oath contemplated in the federal perjury statute. The Supreme Court addressed a similar circumstance in *United States v. Morehead.*[16] In that case, the Court upheld a perjury conviction in which the authority for the administration of an oath by a notary public derived from Department of Interior regulations. The *Morehead* Court noted:

> Ever since the decision in *United States v. Bailey*, 9 Pet. 238, 255, it has been held that an oath administered by a State Magistrate, in pursuance of a valid regulation of one of the departments of the Federal Government, though without express authority from Congress, subjects the affiant to the penalties of the federal statute against false swearing.[17]

Based on the Supreme Court's holding in *Morehead* and the government's assertion that the ASBCA rule derived directly from statute, the *Hobbs* court found that the ASBCA rule providing for depositions had the full force of federal law and constituted a "law of the United States" within the meaning of the perjury statute. In addition, the court held that the state-licensed notary was deemed competent to administer an oath as authorized by federal law. Accordingly, by rejecting both of the defendant's objections, the *Hobbs* court effectively concluded that lying during an ASBCA deposition may constitute a cognizable offense under the federal criminal perjury statute.

Obstructions of Proceedings Before Departments, Agencies, and Committees Under 18 U.S.C. section 1505.

Although no reported cases specifically address obstruction of proceedings before the ASBCA, federal courts have held that perjurious conduct before an administrative proceeding[18] or federal judicial proceeding[19] could constitute not only perjury, but also obstruction pursuant to the appropriate statute. In the *Hobbs* case, the government charged the defendant with obstruction under 18 U.S.C. section 1505.[20]

The threshold issue confronting the government in the prosecution of a case such as *Hobbs* is whether or not the subject agency action constituted a "proceeding" within the meaning of the statute. The term "proceeding" in section 1505, however, is broadly construed to encompass both the investigative and the adjudicative functions of a department or agency.[21] Moreover, federal courts that have considered section 1505 prosecutions consistently have extended the coverage of the term to encompass complaints filed with the National Labor Relations Board,[22] administrative proceedings before the Internal Revenue Service,[23] hearings before the Securities and Exchange Commission,[24] and investigations conducted by the Customs Service[25] and Federal Trade Commission.[26]

Even though the breadth of the term "proceeding" was the most contentious substantive issue on the obstruction charge, the defendant attacked the 18 U.S.C. section 1505 count primarily on the procedural ground of improper venue. Specifically, Ms. Hobbs alleged that the exclusive jurisdiction for prosecuting an obstruction case under that statute is the federal district in which the

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[14] 48 C.F.R. chap. 2, app. A, para. 14(b) (1990).

[15] *See* Fla. Stat. Ann. § 117.01 (West 1990).

[16] 243 U.S. 607 (1917).

[17] *Id.* at 617.

[18] *See* United States v. Alo, 439 F.2d 751 (2d Cir.), *cert. denied*, 404 U.S. 850, *reh'g denied*, 404 U.S. 961 (1971).

[19] United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972).

[20] 18 U.S.C. § 1505 (1982), provides, in pertinent part, "Whoever corruptly ... obstructs or impedes or endeavors to ... obstruct or impede the due and proper administration of the law under which any pending proceedings is being had before any department or agency of the United States ... is guilty of an offense against the United States." This is similar to the language of 18 U.S.C. § 1503, which covers obstruction of judicial proceedings. Cases interpreting section 1503 also will be relevant to section 1505. *See* United States v. Laurins, 857 F.2d 529 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3215 (1989).

[21] United States v. Fruchtman, 421 F.2d 1019 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970).

[22] Rice v. United States, 356 F.2d 709 (8th Cir. 1966).

[23] United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976).

[24] *See Alo*, 439 F.2d at 581; United States v. Batten, 226 F. Supp. 492 (D.D.C. 1964), *cert. denied*, 380 U.S. 912, *reh'g denied*, 381 U.S. 930 (1965).

[25] United States v. Browning, 752 F.2d 720 (10th Cir.), *cert. denied*, 439 U.S. 822 (1978).

[26] *Fruchtman*, 421 F.2d at 1019.

ASBCA offices were located—that is, the Eastern District of Virginia.

The *Hobbs* court noted, however, that the case law cited by defendant held only that venue in section 1505 obstruction cases *may* lie in the judicial district where the predicate "obstructed" action is pending. In addition, the court noted that prior decisions addressing the issue revealed that courts have declined expressly to decide whether a section 1505 obstruction action also may lie in the district where the obstructive acts occurred.[27] Accordingly, the *Hobbs* court relied upon the traditional "substantial contacts" test enunciated by the Second Circuit in *United States v. Reed*.[28] Applying this standard, the court held that because the defendant's acts occurred in the Middle District of Florida, and because most of the witnesses and documentary evidence were located there, venue properly was laid in that district.

In foreclosing the defense's objection to venue, the *Hobbs* court finally noted that although the ASBCA is located in the Eastern District of Virginia, it has no specifically assigned territorial jurisdiction. In particular, the court pointed out that ASBCA "hearings will be held at such places determined by the ASBCA to best serve the interests of the parties and the ASBCA."[29] Accordingly, because the Eastern District of Virginia had no more interest in protecting the integrity of ASBCA proceedings than any other federal district court, that district should be accorded no particular preference for the purposes of venue.

Conclusion

A prosecution related to false testimony before an agency board proceeding requires proof of the traditional three elements of perjury: (1) the falsity of the testimony;[30] (2) the requisite degree of intent;[31] and (3) the materiality of the false statements.[32] Although federal prosecutors may be experienced in establishing these traditional elements of perjury, they may be less familiar with the unique issues that this article has addressed. Specifically, the issues that arose in *Hobbs* likely will appear in cases of perjury and criminal obstruction against witnesses and deponents who render false statements before other agency board proceedings that have distinctive substantive or procedural characteristics. Accordingly, practitioners must be prepared to assert that the agency's rules have the full force and effect of a "law of the United States." In addition, they should be able to show that the agency board action at issue constitutes a "proceeding" as defined by the federal criminal obstruction statute. The Army's experience in the *Hobbs* prosecution demonstrates that the distinctive characteristics of an agency board proceeding—and, in particular, the taking of depositions attendant to an ASBCA proceeding—will not preclude criminal prosecution for perjury under 18 U.S.C. section 1621 and obstruction of proceedings under 18 U.S.C. section 1505. Agency counsel should not be reluctant to seek prosecutions under these statutes when a witness's perjurious testimony damages the integrity of an ASBCA action or any other agency action whose effectiveness depends upon the integrity of its participants.

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[27] United States v. Barham, 666 F.2d 521 (11th Cir.), *cert. denied*, 456 U.S. 947 (1982); United States v. Kibler, 667 F.2d 452 (4th Cir.), *cert. denied*, 456 U.S. 961, *reh'g denied*, 456 U.S. 1012 (1982); United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), *cert. denied*, 452 U.S. 962 (1981); United States v. O'Donnell, 510 F.2d 1190 (6th Cir.), *cert. denied*, 421 U.S. 1001 (1975).

[28] *See* United States v. Reed, 773 F.2d 477 (2d Cir. 1985).

[29] 48 C.F.R. chap. 2, app. A, para. 17 (1990).

[30] *See Lighte*, 782 F.2d at 367.

[31] *See* United States v. Letchos, 316 F.2d 481 (7th Cir.), *cert. denied*, 375 U.S. 824 (1963).

[32] *See* United States v. Scivola, 766 F.2d 37 (1st Cir. 1985).

USALSA Report

United States Army Legal Services Agency

Annual Review of Developments in Instructions

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This article reviews some of the more important appellate cases of the last year involving instructional issues.

Offenses

In *United States v. Mance*[1] the Court of Military Appeals determined that knowledge of the presence of

[1] 26 M.J. 244 (C.M.A. 1988).

the substance and of its contraband nature were essential elements of the offenses of use and possession of controlled substances.[2] The military judge is required to give instructions concerning these elements.[3] Several cases in the last year considered the *Mance* instructional requirements.

In *United States v. Rios*[4] the accused was charged with possession of phendimetrazine, a derivative salt of a substance listed in Schedule III of the Controlled Substances Act.[5] The accused possessed two pills containing the controlled substance along with two caffeine pills. The military judge instructed, in accordance with *Mance*, that the accused could not be convicted if the accused did not have knowledge of the presence of the substance. He failed to instruct, however, that knowledge of the contraband nature of the substance also must be proven.[6] This instructional defect was, under the circumstances, prejudicial error.

In *United States v. Crumley*[7] the Court of Military Appeals extended the *Mance* knowledge elements and concomitant instructional requirements to distribution offenses.[8] The accused was charged with conspiracy to distribute, and distribution of, cocaine. The instructions on conspiracy did not delineate the specific elements of the offense that was the object of the conspiracy, including the element requiring knowledge. Flawless instructions would have included these elements.[9] The omission, however, was harmless because the instructions on "agreement," as an element of conspiracy, clearly indicated that the accused could be convicted only if he actually agreed to distribute contraband. The prosecution theory on one of the distribution offenses was that the accused aided and abetted his wife. No specific knowledge instruction was given. The court held the instructions to be sufficient because, when taken as a whole, they conveyed the message that the accused could be convicted only if he knew his wife was distributing cocaine and that she was aware of its contraband nature. With respect to the other charged distribution, the court found the prosecution and defense evidence to be conflicting and that no middle ground existed.[10] Therefore, the accused either committed the offense with the requisite knowledge or no offense occurred. Upon this evidentiary background, the court held that the knowledge instructions given with respect to the other offenses were sufficient to render harmless any failure to give more specific knowledge instructions.

Crumley was tried almost a year before *Mance* was decided[11] and should not be interpreted as approving instructions that necessarily will be found acceptable in future cases. *Crumley* should be read only as approving instructions that are barely sufficient without the benefit of the *Mance* guidelines.[12]

In another distribution case[13] that may well have been tried prior to the publication of *Mance*,[14] the court held that when entrapment arises as a defense and the accused testifies that he knew he was distributing LSD, the absence of the *Mance* knowledge instructions is not prejudicial error.[15]

Drug offense instructions also were at issue in *United States v. Flannigan*.[16] In *Flannigan* an undercover agent was charged, *inter alia*, with using marijuana. He claimed that his use was not criminal because it was done to protect his undercover status. He therefore requested instructions consistent with his claim. The judge refused and instead instructed that proper simulation by an agent was

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[2]Uniform Code of Military Justice art. 112a, 10 U.S.C. § 912a (1988) [hereinafter UCMJ].

[3]*Mance*, 26 M.J. at 254.

[4]29 M.J. 972 (A.C.M.R. 1990).

[5]21 U.S.C. §§ 801-950 (1988).

[6]If the evidence established that the accused knew he possessed phendimetrazine, an instruction on the contraband nature element would not have been necessary. *See Mance*, 26 M.J. at 254 ("Likewise, if he knows the identity of a substance that he is possessing or using but does not know that such possession or use is illegal, his ignorance in this regard is immaterial because, ... ignorance of the law is no defense.").

[7]31 M.J. 21 (C.M.A. 1990).

[8]*Id.* at 23. Apparently, no reason exists for not applying the *Mance* knowledge requirements to all offenses proscribed by article 112a. Change 4 to Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-76.1 to 3-76.6 (1 May 1982) (C3, 15 Feb. 1989) [hereinafter Benchbook] will incorporate the *Mance* requirements into all article 112a instructions.

[9]*Crumley*, 31 M.J. at 24; *see* Benchbook, para. 3-3.

[10]The opinion is somewhat confusing as to the nature of the conflict. It states that the government agents witnessed the distribution at the appellant's house on March 13, 1987. *Crumley*, 31 M.J. at 22. It further states that according to the accused "his family had been at his home for dinner on March 13, 1987, when the first transaction had been underway." *Id* at 22-23. Subsequently it states, "... if the defense version was believed, Crumley was not present for any drug transaction and could not have innocently delivered a package to" the government agent. *Id* at 24. Possibly the appellant's home and the accused's family home were different locations.

[11]*Mance* was decided on July 18, 1988. *Crumley* was tried on August 28, 1987.

[12]*Cf.* United States v. Cooper, 30 M.J. 201, 204 (C.M.A. 1990).

[13]United States v. McGraw, 29 M.J. 1055 (A.C.M.R. 1990).

[14]The offenses occurred on 9 February, 2 March, and 4 April 1988.

[15]The court appears to have been prescient. *See Crumley*, 31 M.J. at 24 n.4, in which the Court of Military Appeals opined that "Reversal might not be mandated if, for example, the accused has testified and has judicially admitted the facts which established the element as to which an instruction was omitted ... ."

[16]31 M.J. 240 (C.M.A. 1990).

not wrongful. He also instructed that if the use was due to duress—that is, he apprehended a reasonable fear of death or serious bodily injury if he did not use the drugs—the use would be excused.[17]

The Court of Military Appeals found the instructions inadequate. The court stated that the use of marijuana to avoid detection as an undercover agent is not wrongful. Accordingly, the refusal to give the requested instruction was error. Moreover, the duress instruction referred only to legal excusal based on a reasonable fear of significant injury. The instruction did not apply to protection of the undercover status and therefore was insufficient.

Although not specifically cited, the court also might have relied on the conflicting nature of the instructions. The trial judge instructed that use was not wrongful if done pursuant to legitimate law enforcement activities and, as an example, stated that an informant who is forced to simulate the use of drugs to avoid discovery cannot be convicted of wrongful use. This instruction, in effect, equates use and simulation, which would appear to be different acts. The instruction as given was a modification of the instruction in the Military Judges' Benchbook (Benchbook), which provides that use by an informant to avoid detection is not criminal conduct.[18]

One of the more difficult criminal law issues is the determination of force and lack of consent in intrafamily sex offense cases. The standard explanations of force and lack of consent focus on the victim's consent, or lack thereof, as manifested by his or her resistance, but provide little help in determining what degree of force is required.[19] These explanations usually are not helpful in deciding whether intrafamily nonconsensual sex offenses have occurred. In these cases, resistance is either minimal or nonexistent and overt constructive force, such as the threat of bodily harm, rarely occurs.

The Air Force Court of Military Review has faced this issue on several occasions[20] and has determined that "there is constructive force where the sexual intercourse is accomplished under the compulsion of long continued parental duress."[21] When a father is charged with raping his minor daughter, "it is not necessary to show that she physically resisted. It is sufficient that she submitted under compulsion of parental command."[22] When the parent or one standing *in loco parentis* is accused of a nonconsensual sex offense against a minor, "the law is satisfied with less than a showing of the utmost physical resistance of which she is capable."[23]

In *United States v. Palmer*[24] the accused was charged, *inter alia*, with rape and forcible sodomy of his twelve-year-old stepdaughter. The evidence established gradually increasing sexual activity over an extended period of time. Neither force nor threats of force were used. Resistance was minimal. The military judge recognized that the standard instruction was insufficient to guide the members properly. He modified the standard instruction by incorporating Air Force case law and instructed, *inter alia*, "Consent to sexual intercourse if induced by fear, fright or coercion is equivalent to physical force. Accordingly, in the rape of a stepdaughter by her father, it is not necessary to show that she physically resisted. It is sufficient that she submitted under compulsion of a parental command."[25]

The Air Force Court of Military Review found that the evidence presented a scenario of parental coercion designed to accomplish the alleged sexual acts. Under these circumstances, the instruction was tailored to the facts of the case and was proper.

United States v. French[26] is another case involving intrafamily child sex offenses. At issue was whether a stepfather properly could be found guilty of communicating indecent language to his fifteen-year-old stepdaughter by asking if he could climb into bed with her. The court found that he could. It adopted as its test of indecent language "whether the particular language is calculated to

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[17]The instructions are set out in the opinion. *Flannigan*, 31 M.J. at 243-44.

[18]Benchbook, para. 3-76.4. The Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], is not as specific as the Benchbook. It provides "... use ... of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession.") MCM, 1984, Part IV, para. 37c(5). A significant difference exists between the mere possession of drugs and actual use. Nevertheless, both parties agreed that the necessary use of drugs during law enforcement activities is not criminal conduct. The Court of Military Appeals apparently has accepted this position. This immunity from criminal liability, however, does not extend to all offenses "committed in the course of a legitimate drug enforcement operation." *Flannigan*, 31 M.J. at 246 n.5.

[19]*See* MCM, 1984, Part IV, para. 45c (B); Benchbook, para. 3-89(b). *See generally* United States v. Bonano-Torres, 31 M.J. 175 (C.M.A. 1990); United States v. Bradley, 28 M.J. 197 (C.M.A. 1989).

[20]*See, e.g.*, United States v. Torres, 27 M.J. 867 (A.F.C.M.R. 1989); United States v. Dejonge, 16 M.J. 974 (A.F.C.M.R. 1983).

[21]*Dejonge*, 16 M.J. at 976.

[22]*Id.*; *see* United States v. Edens, 29 M.J. 755 (A.C.M.R. 1989).

[23]*Torres*, 27 M.J. at 870.

[24]29 M.J. 929 (A.F.C.M.R. 1989).

[25]*Palmer*, 29 M.J. at 936. The entire instruction defining consent and force is set out in the opinion. *See id.* at 935-36.

[26]31 M.J. 57 (C.M.A. 1990).

corrupt morals or excite libidinous thoughts."[27] Neither the Manual for Courts-Martial[28] nor the Benchbook[29] presently contains this language. For judges to incorporate it into future instructions would be sound practice.[30]

In *United States v. Lyons*[31] the accused appealed his conviction for carrying a concealed weapon, claiming no evidence had been presented that the carrying of the weapon was unlawful.[32] The court held that no evidence need be offered to prove unlawfulness, that unlawfulness may be inferred in the absence of evidence to the contrary,[33] and that the following instruction should be given:

> (1) that carrying a concealed weapon is unlawful unless it is specifically authorized by military regulation or competent authority or is necessitated by the exigencies of military service,
>
> (2) that carrying a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary, and
>
> (3) that the drawing of this inference is not required.[34]

United States v. Sadler[35] is a case that started poorly and was made worse by instructional errors. Pleading errors caused the initial problems. In one specification, the accused was charged with contributing to the delinquency of a minor by furnishing alcoholic beverages in violation of a New Mexico statute. The other specification alleged violation of a New Mexico statute by taking lewd photographs of the minor's genital area.[36] Both specifications also alleged that the conduct was service discrediting. The acts occurred off base in an area where no exclusive or concurrent federal jurisdiction existed. Therefore, these violations of New Mexico statutes[37] were not violations of federal law under the Assimilative Crimes Act[38] and could not be tried by court-martial.[39] Accordingly, alleging violations of the New Mexico statutes was unnecessary.

The military judge instructed that the elements of the first offense were: (1) that alcoholic beverages were furnished; (2) that the furnishing violated the pertinent state statute; (3) that the conduct was service discrediting; and (4) that the furnishing of the alcohol is a violation of the statute if the recipient is under age eighteen.[40] The court found several deficiencies in these instructions. First, the instructions indicated that a violation of the state statute was *per se* service discrediting. The members should have been instructed that guilt could not be predicated solely upon a violation of the statute. A statutory violation, however, was a circumstance that could be considered in determining whether the conduct was service discrediting. Second, the military judge did not delineate the elements of the state offense; he merely gave the members a copy of the statute. Third, the instructions equated the furnishing of the alcohol with contributing to the delinquency of a minor. Although the offense could be proven by establishing that alcohol was furnished,

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[27] 31 M.J. at 60. *See generally* United States v. Prince, 14 M.J. 654 (A.C.M.R. 1982); United States v. Linyear, 3 M.J. 1027 (N.C.M.R. 1977); United States v. Simmons, 27 C.M.R. 654 (A.B.R. 1959).

[28] MCM, 1984, Part IV, para. 89c.

[29] Benchbook, para. 3-158. An interim change to the Benchbook provides the following:

> Para. 3-158, *Indecent Language Communicated to Another*: "Indecent language is that which is grossly offensive to the community sense of modesty, decency, or propriety or shocks the moral sense of the community because it conveys a libidinous message; that is, a lustful, lewd or salacious connotation, either expressly or by implication from the circumstances under which it was spoken. The test is whether the particular language employed is calculated to corrupt morals or excite libidinous thoughts, and not whether the words themselves are impure."

Trial Judge Memorandum 90-6, Office of the Chief Trial Judge, U.S. Army, subject: Indecent Language Instruction, 29 Oct. 1990.

[30] The opinion does not indicate what instruction was given.

[31] 30 M.J. 724 (A.F.C.M.R. 1990).

[32] More than three decades ago, the Court of Military Appeals determined that carrying a concealed weapon was a violation of article 134. It held "all that is needed to establish the offense is to prove that the accused concealed a weapon on or about his person; that the weapon was in fact dangerous; and that the conduct would bring discredit upon the military service". United States v. Thompson, 14 C.M.R. 39, 42 (C.M.A. 1954). The offense was not described in the 1969 Manual for Courts-Martial [hereinafter MCM, 1969], but a form specification which alleged that the carrying was unlawful was provided. *See* MCM, 1969, app. 6. The 1984 Manual, Part IV, para. 134, discusses the offense and includes as a fourth element that the carrying was unlawful. The Benchbook, para. 3-186, and its predecessor, The Military Judges' Guide, Dep't of Army, Pam. 27-9, para. 4-186 (May 1969) [hereinafter Military Judges' Guide], also contain the fourth element. Neither the 1984 Manual nor the judges' materials define unlawfulness.

[33] The defense has the burden of raising the issue as to whether the carrying is lawful. United States v. Thompson, 14 C.M.R. 38, 42 (C.M.A. 1954); *cf.* United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981).

[34] *Lyons* 30 M.J. at 726; *cf. Mance*, 26 M.J. at 254-56; United States v. Sims, 28 M.J. 578 (A.C.M.R. 1989).

[35] 29 M.J. 370 (C.M.A. 1990).

[36] The specifications are set out in the opinion. *See id.* at 372.

[37] The pertinent parts of the statutes are set out in the opinion. *See id.* at 376-77.

[38] 18 U.S.C. § 13 (1988).

[39] United States v. Irvin, 21 M.J. 184 (C.M.A. 1986); *see* United States v. Rowe, 12 M.J. 112 (C.M.A. 1981); United States v. Rowe, 32 C.M.R. 302 (C.M.A. 1962); United States v. Geary, 30 M.J. 855 (N.M.C.M.R. 1990).

[40] The instructions are set out in the opinion. *See Sadler*, 29 M.J. at 373.

whether it constituted an act that contributed to the delinquency of a minor was an issue for the factfinder—not a decision for the judge. Finally, the judge took judicial notice of the state statute, but then instructed that the members were not required to accept his ruling as conclusive.[41] This was error because matters of law are solely for the judge to decide and members may not disregard matters of law judicially noticed.[42]

The instructions on the second offense also were defective. The same error was made regarding judicial notice and the judge's instructions provided no specific delineation of the elements of the state statute.

The requirement for clear and unambiguous instructions was emphasized in several cases.[43] In *United States v. Wales*[44] an officer was charged with fraternization with a female noncommissioned officer (NCO). As originally drafted, the specifications alleged that the NCO was under the accused's military supervision.[45] This allegation was deleted prior to trial. At trial, the trial counsel requested that a reference to the chain of command or supervisory relationship be included in the instructions defining wrongful fraternization. The judge acceded to the request and instructed that compromise of the chain of command was one factor to be considered in determining whether the fraternization was wrongful.[46] The instruction was error.

The Court of Military Appeals reviewed the long and tortured history of Air Force fraternization[47] and concluded that in the Air Force, it is a crime only if it occurs within the chain of command or supervisory relationship.[48] Therefore, proper instructions should advise specifically that unless the members find beyond reasonable doubt that the accused was the NCO's supervisor, he could not be convicted. Because the instructions advised that compromise of the chain of command was merely one factor to be considered, the instructions were deficient.

In *United States v. Youngblood*[49] the accused was charged with aggravated assault by pointing and placing against the head of the victim a dangerous weapon—a loaded .45 caliber pistol.[50] The members announced the accused was guilty of simple assault, excepted the words "pointed" and "placing against the head of the victim" and retained the phrase "a dangerous weapon." The appellate court sought to analyze how the members could find the accused guilty of simple assault with a dangerous weapon.[51] It determined that erroneous instructions caused the anomaly. The judge instructed that a loaded handgun, when used as a firearm, is a dangerous weapon and that an element of aggravated assault is that the weapon was used in a manner likely to produce grievous bodily harm.[52] He did not instruct that a weapon is dangerous when used in a manner likely to produce grievous bodily harm. The court found that without the missing instruction, the given instructions caused the members to believe that any loaded firearm was dangerous, regardless of how used. Because the members were not convinced that the firearm was used in a manner likely to produce grievous bodily harm, it announced a finding of guilty to simple assault, but with a dangerous weapon.[53]

United States v. Berg[54] provides an example of the general rule that instructions must be given on the offenses raised by the evidence. More importantly, it is an even better example of the corollary to the general rule that only the offenses raised by the evidence should be the subject of instructions.

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[41] *See* Benchbook, para. 7-6.

[42] *Compare* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. [hereinafter Mil. R. Evid.] 201A *with* Mil R. Evid. 201.

[43] In addition to the cases noted in the text, see also Osborne v. Ohio, 58 U.S.L.W. 446 (1990), and United States v. Richardson, 30 M.J. 1239 (A.C.M.R. 1990).

[44] 31 M.J. 301 (C.M.A. 1990).

[45] The specifications are set out in the opinion. *See id.* at 302.

[46] The instruction is set out in the opinion. *See id.* at 305. *See generally* United States v. Free, 14 C.M.R. 466 (N.B.R. 1953).

[47] *Wales*, 31 M.J. at 305-08; *see* United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983), *aff'd in part and rev'd in part*, 20 M.J. 155 (C.M.A. 1985).

[48] *Wales*, 31 M.J. at 307. *See generally* United States v. Appel, 31 M.J. 314 (C.M.A. 1990).

[49] 30 M.J. 844 (N.M.C.M.R. 1990).

[50] The specification is set out in the opinion. *See id.* at 845.

[51] The finding is set out in the opinion. *See id.* at 845.

[52] The instructions are set out in the opinion. *See id.* at 847.

[53] Had a properly tailored findings worksheet been used, which included all possible findings based on the evidence and the instructions, the members could not have announced the irregular findings. Presumably, none of the potential findings included on the worksheet would have been irregular. If the members improperly modified a given finding, the judge should have detected it when he examined the worksheet prior to the announcement of findings; he then could have given corrective guidance. Therefore, assuming that accurate instructions were given, a proper worksheet, used correctly, would have prevented the perceived errors in this case. *See generally* MCM, 1984, Part IV, para. 2.

[54] 30 M.J. 195 (C.M.A.), *aff'd on reconsideration*, 31 M.J. 38 (1990).

The accused killed his girlfriend by shooting her in the head in an apartment they shared. He was charged with unpremeditated murder.[55] The government sought to prove not only that the accused had the intent to kill, but also that others in the apartment building were endangered.[56] The military judge instructed that the accused could be convicted of murder if he intended to kill or inflict great bodily harm, or if his act was inherently dangerous to others and evinced a wanton disregard for human life.[57]

The accused was convicted as charged and appealed, claiming no evidence supported the instruction regarding inherently dangerous acts. In a somewhat confusing opinion, the Navy-Marine Corps Court of Military Review agreed.[58] The court found an absence of "evidence that tended to show that another person could have been endangered" by the accused's actions.[59] It held, however, that the accused's animus was directed solely at the victim; therefore the accused could not be convicted of murder under the theory that the act was inherently dangerous to others.[60] Accordingly, the instruction permitting that finding was erroneous.

The Court of Military Appeals affirmed, but disagreed with the lower court on both the facts[61] and the law.[62] On the facts, it found that the victim was killed by a bullet fired from a pistol held in a horizontal position against the victim's head. While it was theoretically possible for a bullet to penetrate the ceiling, the accused did not fire in that direction. Accordingly, the court found as fact that no one other than the victim was endangered.[63] The court also held that the accused's directing *animus* at the victim was immaterial. What is crucial is that the accused's acts be inherently dangerous to others in the general or multiple sense and that the conduct establish a wanton disregard for human life.[64] Because the evidence did not establish that more than one person was endangered, the court agreed that the instruction was erroneous.

United States v. Rushatz[65] is an instructional cousin to *Berg*. The accused was charged with running a fraudulent rental scheme designed to extract exorbitant rental payments from the government.[66] The specification alleged that rental receipts provided by the accused were false in that the amounts entered on the receipts were not paid for rents and were not the true rental fees. The members were instructed that if they were satisfied beyond reasonable doubt that only one of the allegations was established—that is, that the stated amounts were not the true rental prices—they could find the accused guilty.[67] The Court of Military Review affirmed, holding that "where a specification posits two conditions, either of which may satisfy an element ... a military judge may tailor his instructions to permit exception of one."[68]

In *Berg* two possible theories of criminal liability were alleged, but only one was supported by any evidence. Therefore, to instruct on both theories was error. In *Rushatz* both allegations were supported by evidence, but only one was needed for conviction. Accordingly, the instruction giving the members a choice of one or both was proper.[69]

Lesser Included Offenses

The Manual for Court-Martial provides that instructions on lesser included offenses in issue shall be given[70] and that voting on them shall be in order of severity beginning with the most severe.[71] *United States v. Emmons*[72] demonstrates that the determination of which

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[55] UCMJ art. 118. The short form specification alleging unpremeditated murder—that is, killing with the intent to kill or inflict great bodily harm—is identical with the specification alleging murder which is the result of an act inherently dangerous to others that evinces a wanton disregard for human life. Although both of these forms of murder are alleged in the same specification, the evidence presented in court determines if both forms of murder are at issue in a particular case.

[56] *Berg*, 30 M.J. at 197.

[57] The pertinent part of the instruction is set out in the opinion. *Id.*

[58] United States v. Berg, 29 M.J. 567 (N.M.C.M.R. 1989). "We are somewhat confused by the holding below...." *Berg*, 30 M.J. at 198.

[59] *Berg*, 29 M.J. at 569.

[60] *Id.*

[61] *Berg*, 30 M.J. at 199.

[62] *Id. See generally* United States v. Berg, 31 M.J. 38 (C.M.A. 1990).

[63] *Berg*, 31 M.J. at 39.

[64] *Berg*, 30 M.J. at 199.

[65] 30 M.J. 525 (A.C.M.R.), *aff'd*, 31 M.J. 450 (C.M.A. 1990).

[66] The money actually was to be paid by individual officers. Any legitimate rental payments, however, were considered authorized temporary duty expenses for which the officers were to be reimbursed by the United States. The factual background of the scheme is extensively developed in the opinion. *See id.* at 528-30.

[67] A synopsis of the pertinent instruction is set out in the opinion. *See id.* at 538.

[68] *Id.* at 539.

[69] *See generally* Benchbook, para. 7-15. When a specification alleges multiple offenses on divers occasions, the military judge need not instruct that to convict, two-thirds of the members must agree on any one particular act. United States v. Holt, 31 M.J. 758 (A.C.M.R. 1990); *see* United States v. Vidal, 23 M.J. 319 (C.M.A. 1987).

[70] Manual for Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 920(e) discussion.

[71] R.C.M. 921(c)(5).

[72] 31 M.J. 108 (C.M.A. 1990).

lesser included offenses are in issue and the order of their severity can be complicated.

After a night of drinking and using cocaine, the driver of an automobile, the accused, and a third person were riding back to their base. While en route, the accused held a loaded pistol to the driver's head. The weapon discharged, inflicting a fatal wound. In a pretrial statement, the accused admitted holding the loaded pistol to the victim's head, but stated he did not know how or why the shot occurred.

The accused was charged with unpremeditated murder. The military judge determined that aggravated assault with a loaded firearm on an offer theory, involuntary manslaughter, and negligent homicide were lesser included offenses and instructed in that order.[73] The defense unsuccessfully objected to the instruction on aggravated assault, claiming that because the accused caused the death, the judge should not give a nonhomicide offense instruction. The accused was convicted of aggravated assault and the Court of Military Appeals affirmed.

The first issue facing the court was whether the trial judge correctly ruled that aggravated assault was a lesser included offense. Judge Cox found that no *per se* rule prohibited instructions on aggravated assault as a lesser included offense when murder is charged. The test is whether a disputed factual element of the greater offense was not included in the lesser offense.[74] He stated that aggravated assault on the offer theory clearly is included within a murder charge, especially when a factual dispute concerning the accused's intent existed, such as the one appearing in this case. Judge Sullivan, concurring, agreed that no rule prohibited instructing on aggravated assault as a lesser included offense of murder. He also agreed that, based on the evidence, a rational basis existed for the judge to instruct and for the members to convict on the lesser offense of aggravated assault. Chief Judge Everett disagreed, stating that under the facts, aggravated assault was not a lesser included offense. He argued that because the accused's acts indisputably caused the death, no reason existed to instruct on any nonhomicide lesser included offense.[75]

The Chief Judge has the better position. Judge Cox concentrated on the accused's intent, which was certainly in issue. Nevertheless, one cannot seriously dispute that an individual who knowingly holds a loaded pistol to another's head is culpably negligent. Therefore, assuming *arguendo* that the weapon was not fired intentionally, the accused's acts were a proximate cause of the death—that is, they played a material role in the death.[76] Indisputably, the death occurred and the accused caused it. Accordingly, no factually disputed element of murder existed that would permit a rationally based finding of a nonhomicide lesser included offense, such as aggravated assault.

The second issue in *Emmons* was the determination of the proper order to instruct and vote on the lesser included offenses. The military judge determined the order by using the maximum punishment for each offense and Judge Cox found that to be proper.[77] Judge Sullivan was silent on the issue. Chief Judge Everett, however, again disagreed, asserting that maximum punishments are of little relevance. In his view, the various maximum punishments for assaultive crimes have no bearing when a homicide has occurred. More importantly, he argued that severity should be determined by the *mens rea* and moral culpability involved in the offenses. Accordingly, assaultive crimes involving intent are more severe than crimes involving culpable negligence. Similarly, assault with a firearm on a culpable negligence-offer theory should not be considered more severe than a nonfirearm assault in which grievous bodily harm is inflicted intentionally. Because culpability for involuntary manslaughter and an offer-based aggravated assault both are based on culpable negligence, the aggravated assault that does not involve a death should not be considered more severe than involuntary manslaughter, which by definition involves a death.

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[73] The military judge stated that he also was going to instruct on murder by committing an inherently dangerous act evincing a wanton disregard for human life in violation of UCMJ article 118(3). If he did that, he may very well have committed the same error found in *Berg*, 30 M.J. at 195. In *Berg*, as in *Emmons*, a loaded pistol was held up to, and fired at, the head of the victim, causing death. In *Berg* no one else was endangered by the shot. Accordingly, had the accused in *Emmons* been convicted of murder, the issue decided in *Berg* may have been dispositive and the court may not have had to decide the lesser included offense issue. A slight factual distinction, however, exists between this case and *Berg*. In *Emmons* the incident occurred in a moving automobile with a third party present. Therefore, even though the third party was not endangered by the shot, the natural and probable consequences of the accused's acts certainly would include the automobile going out of control, exposing the innocent passenger to danger. Consequently, the accused's actions may have been inherently dangerous to others in the multiple sense.

[74] *Emmons*, 31 M.J. at 110.

[75] Chief Judge Everett's view may be different than one he previously has taken. *See* United States v. Waldron, 11 M.J. 36, 38 n.2 (C.M.A. 1981) (Everett, C.J., concurring in result).

[76] In an opinion by Judge Cox, the court recently thoroughly examined the concept of proximate cause. United States v. Lingenfelter, 30 M.J. 302 (C.M.A. 1990).

[77] The opinion does not state that this is the only method of determining order of severity. No objection was raised at trial to the order of instructions.

Once again, the Chief Judge apparently has the better of the arguments. Judge Cox's position approximates a bright-line rule that is relatively easy to apply. Chief Judge Everett's position involves weighing degrees of *mens rea* and culpability and, to a certain extent, the employment of value judgments. Nevertheless, the easier test is not necessarily the best test. In the practice of criminal law, *mens rea* and degrees of negligence always have been used to differentiate criminal offenses. Nothing prevents judges from doing the same to determine the order of instructions on lesser included offenses.[78]

Defenses

The mistake of fact instruction was at issue in *United States v. Langley*.[79] The accused was charged with assault with intent to commit rape. The military judge instructed that an honest and reasonable mistake as to consent was a defense. On appeal, the accused alleged error, claiming that his mistake need only be honest. The Army Court of Military Review affirmed, citing *United States v. McFarlin*.[80] In *McFarlin* the accused was charged with indecent assault. That court noted that an honest mistake is a defense to a specific intent crime when the mistake vitiates the specific intent element. The mistake, however, related to the victim's consent—not to the element of whether the accused intended to gratify his sexual desires. Accordingly, to be a defense, the mistake must be both honest and reasonable.

In *Langley* the specific intent to commit rape[81]—not merely the intent to gratify sexual desires[82]—was an element. The court disregarded this difference and focused exclusively on mistake as to consent. Because, in its view, the mistake related to a nonspecific intent element, it approved the instruction.[83]

The court's failure to appreciate the different specific intents involved in the two cases spawned an erroneous decision. That McFarlin intended to gratify his sexual desires does not make his conduct any more or less criminal. Acting with the intent to gratify sexual desires is, in many circumstances, normal and acceptable human conduct. What makes it criminal is the lack of consent of the victim. The offense, therefore, is closely akin to a general intent assaultive crime. Accordingly, the defense of mistake as to consent is treated as it is in common assaults—that is, to be a defense it must be honest and reasonable.[84]

The crime of assault with intent to commit rape requires that the accused have the specific intent to have sexual intercourse with a female not his wife by force and without consent. Unlike the intent inherent in indecent assault, the specific intent relates directly to acting without the victim's consent. Accordingly, it is different than general intent assaultive crimes and indecent assault. An honest mistake as to consent directly relates to the specific intent involved and can negate that specific intent. Consequently, to be a defense, the mistake as to consent need be only honest—not honest and reasonable.[85]

Instructions applicable to defenses in specific intent crimes were considered in two other cases. In *United States v. Berri*[86] the accused was charged with attempted murder, maiming, and assault by intentionally inflicting grievous bodily harm—all specific intent crimes. The defense presented psychiatric evidence that the accused was suffering from post-Vietnam stress syndrome which, it claimed, rendered the accused not mentally responsible. The military judge gave mental responsibility instructions, but refused to instruct on the relationship of this evidence to the specific intent elements.[87] The refusal to instruct was error.

In *Ellis v. Jacob*[88] the accused attempted to present testimony of a psychiatrist and others concerning the accused's mental condition at the time of the offense. The evidence would not have raised the defense of lack of

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[78] In a different context, the Court of Military Appeals has ruled that the admissibility of evidence in the sentencing part of the trial is governed by sentencing rules and not by whether the evidence would have been admissible on findings. *See* United States v. Wingart, 27 M.J. 128 (C.M.A. 1988). Flowing from *Wingart* is an argument that maximum punishments are only applicable after findings and have no relevance to prefindings decisions. This position was not addressed in the various opinions.

[79] 29 M.J. 1015 (A.C.M.R. 1990). Another instructional issue involved in this case was whether a voluntary intoxication instruction should have been given. The accused consumed three-and-one-half alcoholic drinks between 2000 and 2330 hours. He consumed no more alcohol until the offense occurred after 0300. No testimony indicated that the accused was drunk or that he appeared drunk. The military judge refused to instruct on voluntary intoxication. The court held that the defense had not been raised by the evidence. *See* United States v. Collier, 29 M.J. 610 (A.C.M.R. 1989); United States v. Box, 28 M.J. 584 (A.C.M.R. 1989).

[80] 19 M.J. 790 (A.C.M.R. 1985).

[81] *See* MCM, 1984, Part IV, para. 64.

[82] *See id.*, Part IV, para. 63.

[83] Interestingly, the court made no mention of, nor gave any indication it was aware of, United States v. Daniels, 28 M.J. 743 (A.F.C.M.R. 1989). *Daniels* was decided nine months before *Langley* and is in direct conflict. The key offense in *Daniels* was attempted rape. In *Langley* it was assault with intent to commit rape. They are, however, essentially the same offense. United States v. Gibson, 11 M.J. 435 (C.M.A. 1981); United States v. Hobbs, 23 C.M.R. 157 (C.M.A. 1957).

[84] *See* R.C.M. 916(j).

[85] *Langley* has been criticized elsewhere in terms similar to the criticism presented here. *See* TJAGSA Practice Note, *Mistake of Fact and Sex Offenses*, The Army Lawyer, Apr. 1990, at 65; *see also* Milhizer, *Mistake of Fact and Carnal Knowledge*, The Army Lawyer, Oct. 1990, at 4.

[86] 30 M.J. 1169 (C.G.C.M.R. 1990).

[87] The military judge concluded that the evidence did not "go directly to the issue of specific intent." *Id.* at 1172.

[88] 26 M.J. 90 (C.M.A. 1988). *Berri* was tried before Ellis v. Jacob was decided but after United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987). *Pohlot* was heavily relied on in *Ellis*. The military judge examined *Pohlot* during the *Berri* trial.

mental responsibility,[89] but purportedly would have been relevant on the element of intent to kill.[90] The Court of Military Appeals held that barring this evidence was error.

In *Berri* the evidence was presented, but the refusal of the military judge to instruct on the relevance of the evidence to the specific intent elements meant that the members might have considered it only on the issue of lack of mental responsibility. In effect, the members could not consider this evidence until they had decided beyond reasonable doubt that the elements of the offense had been proven.[91] The refusal to give the instruction essentially deprived the accused of his ability to present evidence relating to the *mens rea* elements and, therefore, was improper.[92]

In *United States v. Rodriguez*[93] the defense was accident. A medical doctor was charged with indecent assault by touching female examinees on parts of their bodies that were unrelated to the purpose of the examinations.[94] Dr. Rodriguez claimed that if the touchings occurred, they were unintentional and incidental to the exams. The military judge gave the standard accident instruction.[95] The Court of Military Appeals affirmed,[96] but indicated that the instruction should have included the advice that even if the members conclude a negligent touching occurred, and therefore was not an accident, they may not convict unless they find that the touching was intentional and was with the requisite specific intent.[97]

Two Air Force Court of Military Review cases demonstrate that military judges must be alert to instructions on nonstandard defenses. In one case,[98] the owner of an automobile physically restrained the accused, whom he suspected of breaking into the car. The accused responded by assaulting the owner, which led to his being charged with aggravated assault.[99] The defense was self-defense and the military judge gave appropriate instructions. He also instructed that under the applicable state law,[100] a private person may arrest for a felony.[101] Therefore, if the owner was making a citizen's arrest based on probable cause, the defense of self-defense did not exist. The court held the instruction proper and affirmed.

In the other case,[102] an officer was charged with maltreatment of subordinates by making suggestive and vulgar remarks to them and by committing suggestive acts in their presence.[103] The evidence established that the actions and remarks were not accepted by the subordinates as serious invitations to participate in sexual activity. The defense requested an instruction that if the acts and conduct were committed in jest or as a joke, they did not constitute maltreatment. The judge refused to give that instruction and his decision was affirmed. The issue was not whether the accused was joking or serious; rather, it was whether his conduct, taken as a whole under the circumstances, "rose to the level of maltreatment because of its abusive nature."[104] Accordingly, the requested instruction was incomplete and misleading.

Evidence

In *United States v. Jones*[105] the defense sought to adapt the accomplice testimony instruction[106] to government informants. It requested an instruction that a government informant's testimony is of questionable integrity and should be received with great caution. The defense also requested the judge to instruct that the accused could not be convicted on the uncorroborated testimony of an informant if the testimony was self-contradictory, uncertain, or improbable. The military judge rejected the requests and gave a standard credibility instruction.[107] The appellate court approved, stating that no requirement existed to give the requested instruction.

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[89] *See* UCMJ art. 50a; R.C.M. 916(k).

[90] *Ellis*, 26 M.J. at 91.

[91] *See* R.C.M. 921(c)(4).

[92] The Army Court of Military Review has opined that an instruction similar to the one requested in *Berri* must be given sua sponte. United States v. Tarver, 29 M.J. 605, 609 (A.C.M.R. 1989).

[93] 31 M.J. 150 (C.M.A. 1990).

[94] The facts are set out in detail in the opinion. *See id.* at 152-53.

[95] The instruction is set out in the opinion. *See id.* at 156; Benchbook, para. 5-4.

[96] Judge Cox, writing the opinion, stated that the accident instruction "did somewhat confuse the element of specific intent with negligence." *Rodriguez*, 31 M.J. at 157. The confusion is not readily apparent.

[97] To properly use the Benchbook accident instruction in assault cases, the instruction in paragraph I, assault in homicide cases, must be modified. The second paragraph consisting of two sentences of II, Accident in Assault Cases, also must be used. This second paragraph was not included in the *Rodriguez* instructions.

[98] United States v. Shepherd, 30 M.J. 652 (A.F.C.M.R. 1990).

[99] The accused also was charged with attempted larceny of the automobile's stereo. Ironically he was acquitted of that offense.

[100] The incident occurred off base in Florida.

[101] The instruction is set out in the opinion. *See Shepherd*, 30 M.J. at 654.

[102] United States v. Hanson, 30 M.J. 1198 (A.F.C.M.R. 1990).

[103] The facts are set out in the opinion. *See id.* at 1200.

[104] *Hanson*, 30 M.J. at 1201.

[105] 30 M.J. 898 (A.F.C.M.R. 1990).

[106] Benchbook, para. 7-10; *see also* R.C.M. 918(c) discussion.

[107] Benchbook, para. 7-7.

In *United States v. McLaurin*[108] the Court of Military Appeals ruled that when identification is the primary issue in the case, upon request, the military judge should give an instruction incorporating factors designed to minimize the dangers of misidentification.[109] The court also approved the use of an interracial identification instruction.[110]

In *United States v. Thompson*[111] the issue was whether refusing to give an interracial identification instruction was proper. The victim was a Turkish national who owned a German gasthaus. The accused, who was black, was charged with the violent robbery of the victim at the gasthaus. The primary issue at trial was the identification of the accused by the victim. No evidence was presented that raised cross-racial identification as an issue. Accordingly, the military judge refused to give an interracial identification instruction as approved in *McLaurin*. The Court of Military Appeals affirmed, holding that the interracial identification instruction need not be given merely because the witness and the accused are of different races. Instead, cross-racial identification must be a primary issue in the case and some evidence must indicate that race played a role in the identification. Because no such evidence was presented,[112] the instruction was not necessary.

In *United States v. Miller*[113] the Court of Military Appeals upheld various military evidence rules relating to the voluntariness of confessions and the requirements for appropriate instructions. The accused was charged with premeditated and felony murder to which he confessed prior to trial. The defense made no motion to suppress the confession, but presented evidence on the merits that, because of the accused's prior consumption of alcohol and LSD, the confession was involuntary. The military judge instructed that the members should consider this evidence and give the confession the weight and significance it deserves under the circumstances.[114] On appeal, the defense claimed that the members should have been instructed that they must determine if the confession was voluntary, and only if they were convinced beyond reasonable doubt of its voluntariness may they consider it.

The court affirmed. It held that while the defense argument was once valid,[115] military law was changed by the Military Rules of Evidence.[116] Under those rules, the voluntariness of a pretrial statement is decided solely by the military judge.[117] Therefore, voluntariness instructions are unnecessary. Moreover, the judge need not make any sua sponte ruling. Voluntariness issues must be raised by the defense.[118] When the defense forgoes motions to suppress, but presents evidence of voluntariness on the merits, that evidence relates to the weight to be given the statement—not to its admissibility.[119] When voluntariness evidence is presented, the military judge must instruct as to weight.[120] The court concluded that the Military Rules of Evidence were followed and no further instructions were required.

Several recent cases demonstrate that when inadmissible evidence is presented, prompt curative instructions are the appropriate remedy.[121] When the prosecution presented evidence that the accused remained silent after a doctor asked him about child abuse, the error was cured by an immediate instruction not to attach any significance to the silence.[122] In another case, *United States v. Zaccheus*,[123] the trial counsel's opening statement and the special agent's testimony indicated that the accused terminated an interrogation to speak to his lawyer. The court held that an instruction that opening statements are not evidence, together with the judge's actions in striking the agent's testimony and twice instructing that it be disregarded, cured any error. Similarly, an instruction to dis-

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[108] 26 M.J. 310 (C.M.A. 1986).

[109] The court listed the factors used by the Supreme Court in Neil v. Biggers, 409 U.S. 188 (1972). *See McLaurin*, 26 M.J. at 312. It specifically approved an instruction found in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), and set it out in the appendix to the opinion. *See McLaurin*, 26 M.J. at 313-14.

[110] *McLaurin*, 26 M.J. at 312-13 n.2.

[111] 31 M.J. 125 (C.M.A. 1990).

[112] The evidence established that the victim "had no difficulty in distinguishing appellant from young other black men who had the same physical build and complexion ...." *Id.* at 128. "[T]here is no evidence that she had any special problem in identifying black people ...." *Id.* Actually, she was offended by the suggestion that many blacks look alike. *Id.* at 128-29.

[113] 31 M.J. 247 (C.M.A. 1990).

[114] The instruction is set out in the opinion. *See id.* at 249; *see* Benchbook, para. 4-2.

[115] *See* United States v. Graves, 1 M.J. 50 (C.M.A. 1975); MCM, 1969, para. 140a.

[116] *See generally* Mil. R. Evid. 304.

[117] *See* Mil. R. Evid. 304(e)(1).

[118] Mil. R. Evid. 304(a).

[119] Mil. R. Evid. 304(e)(2).

[120] *Id.*

[121] "Giving a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error when court members have heard inadmissible evidence, as long as the curative instruction avoids prejudice to the accused." *Rushatz*, 31 M.J. at 456.

[122] United States v. Curry, 31 M.J. 359 (C.M.A. 1990).

[123] 31 M.J. 766 (A.C.M.R. 1990).

has been inconsistent and unclear. The court needs to decide a very simple issue: Is rule 105 the law and, if it is not, then what is the law? Before the court decides that issue, however, it first must recognize the confusing and contradictory nature of its jurisprudence. Until the court recognizes it has created and fostered confusion, uncertainty will reign at the trial level. Until the fog of uncertainty is dissipated, the military judge should be prepared to give the uncharged misconduct instruction for all nonnexus evidence. Moreover, he or she always should ask the defense if it wants that instruction and should give the instruction unless the defense requests it not be given.[150]

Procedure

A decade ago,[151] the Court of Military Appeals held that defining reasonable doubt as a substantial doubt was error.[152] The Supreme Court recently has affirmed the wisdom of the earlier cases.[153] A jury was instructed that "a reasonable doubt is not a mere possible doubt. It is an actual substantial doubt"[154] and "it must be such doubt as would give rise to a grave uncertainty."[155] In a per curiam opinion, the court reversed, holding "it is plain to us that the words "substantial" and "grave," ... suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard."[156]

In *United States v. Westmoreland*[157] the Court of Military Appeals emphasized the judge's responsibility to instruct members properly and comprehensively that this responsibility continues even after deliberations have begun. The accused was charged with conspiracy to commit murder and premeditated murder.[158] The government's theory was that a Corporal Morelock hired the accused to murder Morelock's wife and that Morelock lured his wife to a secluded area where the accused fatally stabbed her. Both sides tried the case on the theory that the accused actually stabbed the victim or did nothing at all. Consequently instructions on aiding and abetting[159] and co-conspirator vicarious liability[160] were not given.

During deliberations, the members asked if the accused could be found guilty of murder as a co-conspirator.[161] The military judge interpreted the question as also inquiring whether the law of principals[162] might apply. After a recess of several days,[163] he gave an aider and abetter instruction regarding the murder charge. Subsequently, the members found the accused guilty of murder by aiding and abetting Morelock.[164]

On appeal, the defense claimed that at some point prior to findings the government must elect its theory of the case and the military judge may not instruct on other theories. The court rejected this argument. It held that the evidence—not the theories of the parties—determines which theories shall be the subject of instructions. In this case, a plausible factual scenario was raised by the evidence and the member's question. Therefore, the military judge not only could instruct on other theories, but also had a sua sponte duty to give those instructions.[165] That the question and instruction occurred after deliberations began was of no consequence.

Sentencing

In *United States v. Needham*,[166] a drug prosecution, the Court of Military Appeals considered the use of extracts of Drug Enforcement Administration (DEA) publications concerning the effects of certain drugs. The court

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[150] If the defense requests that the instruction not be given, the judge should ensure that the reasons for the request are set out clearly in the record.

[151] United States v. Cotten, 10 M.J. 260 (C.M.A. 1981); United States v. Salley, 9 M.J. 189 (C.M.A. 1980).

[152] The standard Benchbook instruction no longer defines reasonable doubt as substantial doubt. *See* Benchbook, para. 2-29.1.

[153] Cage v. Louisiana, 59 U.S.L.W. 3361 (1990).

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] 31 M.J. 160 (C.M.A. 1990).

[158] The specifications are set out in the opinion. *See id.* at 161.

[159] Benchbook, para. 7-1a.

[160] *Id.* para. 7-1b.

[161] *See* M.C.M. 1984, Part IV, para. 5(c)(5).

[162] *See* UCMJ art. 77; MCM, 1984, Part IV, para. 1.

[163] In view of the changed theory, the military judge gave the defense a recess to decide if it wanted to reopen its case. The court indicated that the changed theory probably necessitated the defense be given this opportunity. The court, however, also indicated that the specifications upon which the accused was tried properly alleged criminal liability as the actual perpetrator, aider and abettor, and co-conspirator.

[164] The members unnecessarily amended the specification to state guilt clearly on an aiding and abetting theory. *Westmoreland*, 31 M.J. at 163.

[165] The military judge declined to give the co-conspirator vicarious liability instruction. The court indicated this may have been an unwarranted gift to the accused. Actually, by charging conspiracy, the accused was placed on more notice of this theory of liability than he was with respect to theory of aiding and abetting.

[166] 23 M.J. 383 (C.M.A. 1987).

expressed doubts as to the admissibility of the extracts although it acknowledged that some of the contents were relevant to sentencing. Eventually, it held that the actions of the trial judge, including instructions that the members need not accept the publications as conclusive, made the admission of the extracts harmless error.

In *United States v. Eads*[167] DEA extracts also were admitted in sentencing. The court held the admission was error and stated that when documents containing general drug information properly are admitted, they should be accompanied by instructions. These instructions should advise that the material provides general information about drugs, but does not purport to describe the accused's offenses. The instructions also should advise that, with respect to the accused's offenses, the members should consider the other evidence in the case.

In *United States v. Kuhnel*[168] general drug abuse information was provided by the local chief of flight medicine. On appeal, the defense, citing *Needham* and *Eads*, claimed that the military judge had a sua sponte responsibility to give a limiting instruction concerning the testimony. The court disagreed. It believed that the substantial difference between live testimony, which was subject to cross-examination, and publications rendered a requirement for a sua sponte instruction unnecessary. The court, however, encouraged giving a limiting instruction if requested and deemed helpful.[169]

United States v. Mullens[170] also considered limiting instructions concerning admissible aggravation evidence. In accordance with his plea, the accused was convicted of various child sexual abuse crimes. The stipulation of fact included other similar misconduct committed upon the same victims several years prior to the charged offenses. On appeal, the defense asserted that a limiting instruction concerning the uncharged offenses should have been given. The court noted that no request for an instruction was made at trial and, in view of the number of charged offenses, the instruction would have been superfluous. The judge also instructed that the accused could be sentenced only for the offenses of which he was found guilty. Accordingly, no error was committed.

Limiting instructions concerning inadmissible evidence were considered in *United States v. Cherry*.[171] The accused's company commander was asked his opinion of the affect upon the unit of the accused's use of cocaine. His response was "a general condemnation of drug users in the military,"[172] instead of focusing on the accused's conduct as it related to the unit's mission. The judge instructed that the testimony could be considered with respect to the impact upon the unit, but it must be disregarded totally concerning the accused's rehabilitative potential.[173] The court held the instructions were insufficient because the judge did not advise the members to disregard the commander's opinion[174] testimony.[175]

The military judge's "affirmative duty to interrupt an improper argument and give the necessary cautionary instructions to the court members"[176] was discussed in two cases. In *United States v. Rutherford*[177] the trial counsel argued that the accused probably had used cocaine on occasions not charged, but no evidence suggesting prior use was presented. The argument was improper and the judge's failure to instruct the members to disregard resulted in reversal. In the other case, *United States v. Jones*,[178] the trial counsel argued that the accused had not been rehabilitated because he had not shown remorse or admitted guilt during a five-day contested trial. No objection was made, nor did the defense

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[167] 24 M.J. 919 (A.F.C.M.R. 1987).

[168] 30 M.J. 510 (A.F.C.M.R. 1990).

[169] The contents of the suggested limiting instruction are not set out in the opinion. Presumably they should be similar to the instruction suggested in *Eads*. *See Eads*, 24 M.J. at 919.

[170] 29 M.J. 398 (C.M.A. 1990).

[171] 31 M.J. 1 (C.M.A. 1990).

[172] *Id.* at 5.

[173] The instruction is set out in the opinion. *See id.* at 6.

[174] To tell from the opinion exactly which of the witness's opinions the court found objectionable is difficult. The testimony appears to be set out verbatim. In his testimony the commander attacked drug use in the military and drug use by NCOs. Moreover, he stated that the Army has no place for an NCO who uses drugs and that such an NCO cannot be an asset to the Army.

[175] The Court of Military Appeals is very concerned with inappropriate sentencing testimony given by commanders. *See, e.g.*, United States v. Aurich, 31 M.J. 95 (C.M.A. 1990); United States v. Kirk, 31 M.J. 84 (C.M.A. 1990); United States v. Gordon, 31 M.J. 30 (C.M.A. 1990); United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989); United States v. Horner, 22 M.J. 294 (C.M.A. 1986).

[176] United States v. Rutherford, 29 M.J. 1030, 1031. (A.C.M.R. 1990).

[177] *Id.*

[178] 30 M.J. 898 (A.F.C.M.R. 1990).

request an appropriate instruction. The court held that the argument amounted to plain error and that the absence of a curative instruction mandated reversal.

The effect of a punitive discharge instruction[179] was at issue in two cases. In *United States v. Gadson*[180] the defense requested that the judge instruct on the deleterious effects a punitive discharge might have on the accused's ability to find future employment. The judge refused, stating it was a matter for argument. He then gave the standard Benchbook instruction.[181] That instruction, however, is silent about future employment disabilities,[182] but states that a punitive discharge is a severe punishment that deprives the individual of substantially all government veterans' benefits. The appellate court affirmed, holding that the military judge properly handled the matter.

In *United States v. Goodwin*[183] the military judge did not instruct that a punitive discharge would deprive the accused of substantially all benefits administered by the Department of Veterans' Affairs and the Army establishment. No objection was made at trial. On appeal, the accused, a staff sergeant with several prior honorable discharges, claimed that he had been prejudiced by the omitted instruction. The Court of Military Review disagreed. It held that a punitive discharge would deprive the accused of veterans' benefits accrued only in the term of enlistment to which it applied. Accordingly, the accused would not be deprived of the veterans' benefits earned during the enlistments from which he previously had been discharged honorably.[184] The court recommended that the standard instruction be modified to indicate that the loss of benefits occasioned by a punitive discharge affects only the term of enlistment to which the discharge applies.[185]

Last year, the Army Court of Military Review[186] held that to instruct on findings that the junior member will not count the votes is error,[187] but that, in the absence of an objection, the error will not cause reversal. A different panel reached the same result with regard to sentencing.[188] This year, however, the court found prejudicial error.[189] It held that sentencing instructions which fail to mandate not only that the vote be by secret written ballot, but also that the junior member collect and count the votes, constitute plain error.[190]

When determining a sentence, the members properly may consider that the accused has lied under oath during the merits portion of the trial.[191] This evidence, however, must be considered within prescribed limits. Accordingly, when the trial counsel's argument raises the issue of false testimony, or when otherwise deemed appropriate, the military judge must instruct: (1) the false testimony should play no role whatsoever unless the members conclude that the accused lied under oath to the court; (2) the members must conclude that the lies were willful and material; (3) the mendacity may be considered only as it bears upon the likelihood of the accused's rehabilitation; and (4) the accused may not be punished additionally for the lies themselves.[192]

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[179] *See* Benchbook, para. 2-37, at 2-44.

[180] 30 M.J. 749 (A.F.C.M.R. 1990).

[181] Benchbook, para. 2-37, at 2-44.

[182] In United States v. Soriano, 20 M.J. 337 (C.M.A. 1985), the military judge instructed that "a punitive discharge may affect an accused's future with regard to his legal rights, economic opportunities and social acceptability." *Id.* at 341. The court noted that the instruction as given differed from the standard instruction in the Military Judges' Guide, para. 8-4 a(1), which provided that a punitive discharge "will" clearly affect an accused's future. The court found the substitution of "may" for "will" error, but determined that, under the circumstances, it was harmless. The present standard instruction in the Benchbook makes no reference to the effect of a punitive discharge upon legal rights, economic opportunities, or social acceptability.

[183] 30 M.J. 989 (A.C.M.R. 1990).

[184] In Waller v. Swift, 30 M.J. 139 (C.M.A. 1990), the court accepted as correct in law and fact that a punitive discharge applies to only the present enlistment and has no affect on benefits earned during prior enlistments. "Waller had received an honorable discharge with respect to an earlier period of service and therefore, would be entitled to receive veteran's benefits related to that earlier period of service despite the bad-conduct discharge that terminated his current enlistment." *Id.* at 144.

[185] *See also* United States v. Lenard, 27 M.J. 739 (A.C.M.R. 1988).

[186] United States v. Kendrick, 29 M.J. 792 (A.C.M.R. 1989).

[187] The instruction is set out in the opinion. *See id.* at 793.

[188] United States v. Hutto, 29 M.J. 917 (A.C.M.R. 1989).

[189] United States v. Harris, 30 M.J. 1150 (A.C.M.R. 1990).

[190] Also omitted from the instruction were directions that only the members be present during deliberations and voting, that superiority in rank shall not be used, and that deliberations include full and free discussion.

[191] United States v. Warren, 13 M.J. 278 (C.M.A. 1982).

[192] *Id.* at 285-86. The guidance has been incorporated into a standard instruction. *See* Benchbook, para. 2-60.

United States v. Felton[193] is an unfortunate example of how not to give the mendacious accused instruction.[194] The judge instructed that the findings indicated that the accused was mendacious rather than allowing the members to make that decision. Additionally, he failed to direct the members to decide if the false testimony was willful and material. He also improperly indicated that the issue of rehabilitation was linked to a punitive discharge.[195] Moreover, he indicated that the accused lacked integrity and then lectured the court on the importance of integrity. Accordingly, the court held that the judge had usurped the members' sentencing function.[196]

Capital Sentencing

In *United States v. Murphy*[197] one of the aggravating factors at issue was whether the "murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim."[198] A member asked for a clarification of the term "prolonged." The judge responded by stating "more than instantaneous." The appellate court found that the aggravating factor was intended to convey the concept of torture and that the definition supplied by the judge was inadequate to convey that concept.[199]

The Supreme Court resolved a number of capital sentencing issues over the past year. It upheld as constitutional a jury instruction given pursuant to a state statute which provided that death shall be imposed if the jury finds the existence of at least one aggravating circumstance and that no mitigating circumstances existed.[200] The Court also held that an instruction directing the jury to consider any other circumstance that extenuates the gravity of the crime, even though that circumstance is not a legal excuse for the crime, does not limit unconstitutionally the evidence the jury may consider.[201] The petitioner claimed that the instruction limited the jury's consideration to evidence related to the crime itself. The Court held that no reasonable likelihood of a juror interpreting the instruction in that manner existed. Rather, "the jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character."[202] The Court, however, held unconstitutional an instruction that required juries to find the existence of mitigating circumstances by unanimous vote before those circumstances may be considered.[203]

In *Saffle v. Parks*[204] the trial judge instructed, *inter alia*, that the jury "must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factory when imposing sentence."[205] Parks attacked the instruction, claiming it conflicted with the holding of an earlier case, *California v. Brown*.[206] In *Brown* the jury was instructed that it must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[207] Parks claimed that this instruction means that the jury must not be swayed by sympathy not based on the evidence, but that to be swayed by sympathy based on the evidence is permissible. He therefore asserted that the instruction given in his case, that the jury not be swayed by sympathy, is erroneous. The Court rejected the argument stating, "It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular juror's emotional sensitivities with our long-standing recognition, that, above all, capital sentencing must be reliable, accurate and non-arbitrary."[208]

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[193] 31 M.J. 526 (A.C.M.R. 1990).

[194] The instruction is set out in the opinion. *See id.* at 533.

[195] *See* United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989); *see also* United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989).

[196] The military judge may summarize the evidence. If he or she does, the summarization must be fair and impartial. Unfortunately, what the court said in another context appears appropriate here:

> In like manner, our reading of the comments by the military judge suggests that, while he was attempting to comply with the principle that instructions be "tailored" to the evidence, he failed to do so in an even-handed manner. Indeed, in some respects the marshaling of the evidence in favor of the Government would do credit to a prosecutor's argument.

United States v. Grandy, 11 M.J. 270, 277 (C.M.A. 1981).

[197] 30 M.J. 1040 (A.C.M.R. 1990).

[198] R.C.M. 1004(c)(7)(I).

[199] The military judge instructed that, on findings, the junior member will collect the ballots, but not count the vote. This was considered only harmless error because the vote was announced as unanimous. *See Kendrick*, 29 M.J. at 792.

[200] Blystone v. Pennsylvania, 58 U.S.L.W. 4274 (1990); *accord* Walton v. Arizona, 58 U.S.L.W. 4992 (1990); Boyde v. California, 58 U.S.L.W. 4301 (1990).

[201] *Boyde*, 58 U.S.L.W. at 430.

[202] *Id.* at 4305.

[203] McKoy v. North Carolina, 58 U.S.L.W. 4311 (1990).

[204] 58 U.S.L.W. 4322 (1990).

[205] *Id.*

[206] 479 U.S. 538 (1987).

[207] *Brown*, 479 U.S. at 542.

[208] *Parks*, 58 U.S.L.W. at 4324.

Article 69, UCMJ, Applications—R.C.M. 1112 Review

A recent application[1] under the provisions of Uniform Code of Military Justice (UCMJ) article 69,[2] epitomizes a recurrent problem with the post-trial review by judge advocates under Rule for Courts-Martial (R.C.M.) 1112.[3] R.C.M. 1112(c) states, "No person may review a case under this rule if that person has acted in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense."[4] An increasing number of records of trial are being received for review by The Judge Advocate General in which the R.C.M. 1112 review was performed by a chief of criminal law whose office prosecuted the accused at a special court-martial or processed the accused's summary court-martial for trial. This practice raises a presumption of error in view of R.C.M. 1112's proscription that no person who has acted on behalf of the prosecution may perform the review.

The essential function of a chief of the staff judge advocate's military justice section is to act on behalf of the government in prosecutorial decision making. The recommendations of the chief of criminal law concerning whether a case should go to court and what level of court-martial is appropriate usually are given great weight by the convening authority. Therefore, even in the case of a summary court-martial, the chief of criminal law plays an important role in prosecutorial decision making.

A chief of criminal law may perform the R.C.M. 1112 review if the record affirmatively reflects that he or she played no role in any phase of the decision to prefer charges or in the subsequent processing of the case. This scenario might arise when the chief of criminal law did not assume his or her duties until after the applicant's case had been acted upon in the convening authority's final action. The best practice to avoid unnecessary disputes over whether the chief of criminal law acted "on behalf of the prosecution," however, is to designate another judge advocate to perform the review.

Another recurring problem that appeared in this recent application is the failure of the reviewing judge advocate to respond to the allegations of error that the applicant raises in his or her R.C.M. 1105 matters.[5] A response to each allegation of error raised by the accused in his post-trial matters is mandated by the rule. Captain Trebilcock.

Article 69, UCMJ, Applications—*Ex Parte* Communications

Another recent application[6] under the provisions of UCMJ article 69, illustrates the importance of the summary court-martial officer's avoiding *ex parte* communications with witnesses. The applicant was charged with one specification of marijuana use based on a positive urinalysis. The applicant requested a drug and alcohol counselor, Ms. Bolis, to testify why his wife, who was also a soldier, originally had been identified wrongly by the post alcohol and drug counseling office (ADCO) as the party with the positive urinalysis result. Rather than produce the witness, the summary court-martial officer declared a lunch recess and told the applicant that she would contact Ms. Bolis to discover the source of the mistake. The record does not reflect that the applicant requested this action or consented to it.

The summary court officer telephoned the ADCO and first spoke with an unidentified counselor. The counselor explained the procedures that the ADCO followed to link a positive urinalysis report, which bears only a social security number, with the soldier who gave the sample. The summary court-martial officer then spoke with Ms. Bolis, who related essentially the same information.

The summary court officer returned from lunch and relayed the information she had discovered to the applicant. The summary court officer then suggested to the applicant that he waive production of Ms. Bolis and stipulate to her testimony. The record does not reflect that the applicant agreed to the stipulation, but he no longer requested Ms. Bolis as a witness.

The Acting The Judge Advocate General set aside the applicant's conviction because the summary court officer violated the absolute prohibition against *ex parte* communications between the factfinder and witnesses. The summary court officer's use of a summary of the *ex parte* communication to induce the applicant to withdraw his request for the witness's production also was found to be improper. Specifically, the practice is improper because it permits the summary court officer to play a dual role as an investigator and a judge. Moreover, it impinges upon the applicant's sixth amendment[7] right to confrontation.

The proper course of action to follow when an *ex parte* communication occurs is to create as complete a record as possible of the communication and its effects on the factfinder.[8] Seeing that the record of the communication

[1] United States v. Smith, SCM 1990/0016.

[2] Uniform Code of Military Justice art. 69, 10 U.S.C. § 869 (1988).

[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1112 [hereinafter R.C.M.].

[4] *Id.*

[5] *See* R.C.M. 1112(d)(2).

[6] United States v. Davenport, SCM 1989/6009.

[7] *See* U.S. Const. amend. VI.

[8] *See* United States v. Adamiak, 15 C.M.R. 412 (C.M.A. 1954).

is complete is in the government's interests because it bears the burden of rebutting the presumption of prejudice that attaches to *ex parte* communications. Captain Trebilcock.

Clerk of Court Note

Summary Courts-Martial Under Review

The number of summary courts-martial being reviewed under Uniform Code of Military Justice article 69(b) is increasing. Additionally, acting under new authority, the Acting The Judge Advocate General already has referred two cases to the Court of Military Review. As if summarized records of trial by general or special court-martial records were not sufficiently difficult to review, the meager records of summary courts-martial are even worse—especially if the compiler of the record has not followed fully the provisions of Army Regulation 27-10, Legal Services: Military Justice, para. 5-31*d*(5) (22 Dec. 1989) [hereinafter AR 27-10], concerning the content of the record. A deficient record can spell the difference between affirmance and reversal.

Staff judge advocates should ensure that summary court-martial records include everything that is required. Actually, a record that is sufficient under the regulation still may not be sufficient in some cases to permit an informed review of an accused's allegations of error. Some applications for relief in summary court-martial cases are filed with the general court-martial convening authority's staff judge advocate. The staff judge advocate then must comment on each allegation made by the applicant, and also may need to obtain an affidavit from the summary court-martial officer to clarify the facts. *See* AR 27-10, paras. 14-3*a*(3),(4). When the application is filed with the Examination and New Trials Division instead, a copy is sent to the staff judge advocate for the same purpose. The staff judge advocate's comments should address each of the applicant's allegations to the fullest extent possible so that a just determination, protecting both the interests of the accused and the government, can be made.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Accident and Specific Intent Crimes

The accused in *United States v. Rodriguez*[1] was convicted of six specifications of indecent assault.[2] The charged incidents involved several ostensible medical examinations that the accused performed on five female patients.[3] The accused contended that he never acted to gratify his sexual desires during his contact with the women, and that any seemingly inappropriate touching was either proper or inadvertent.[4]

During the military judge's instructions on findings, the members were told that to convict the accused of the charged offenses the government must prove beyond a reasonable doubt that the accused specifically intended to gratify his lust and sexual desires.[5] The military judge also instructed the members, without objection by the defense, that the accused could not avail himself of the accident defense if he was negligent.[6] On appeal, the defense contended that the accident instruction, at least in the context of the charged offenses, was erroneous and prejudicial.

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[1]31 M.J. 150 (C.M.A. 1990).

[2]Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1988) [hereinafter UCMJ].

[3]*Rodriguez*, 31 M.J. at 152-54. The accused was assigned to an Air Force hospital as an internal medicine specialist. *Id.* at 152. The five female victims were all military family members who the accused examined at the hospital. *Id.*

[4]*Id.* at 154.

[5]*Id.* at 157.

[6]The judge's instructions are set forth in greater detail in the opinion. *See id.* at 156-57.

Indecent assault is a specific intent offense.[7] To be guilty of this crime, the acts of the accused must have been "done with the intent to gratify the lust or sexual desires of the accused."[8]

The accident defense operates generally to excuse certain nonnegligent conduct that otherwise would be criminal.[9] The Manual for Courts-Martial (Manual) provides that the "defense of accident is not available when the act which caused the death, injury, or event was a negligent act."[10] The military decisional law is consistent in disallowing the accident defense when the accused acts negligently.[11]

Accordingly, in circumstances such as those in *Rodriguez*, the military judge is faced with properly instructing the members on a defense concerned with the accused's negligence, in connection with a crime concerned with the accused's specific intent. Although the court in *Rodriguez* held that reversal was not required under the circumstances of that case,[12] it nonetheless found that the military judge's instructions were "somewhat confus[ing]."[13]

The court advised that the preferable procedure would have been for the military judge to instruct the members that "although [the accused's] conduct may have been negligent, they may determine that he did not intentionally touch any of the victims or have the specific intent to gratify his sexual desires."[14] More accurately, the judge should have instructed the members, in addition to the elements of proof for indecent assault and to the defense of accident, that

> although the accused's conduct may have been negligent, you may nevertheless find the government failed to prove beyond a reasonable doubt that the accused intentionally touched any of the victims or had the specific intent to gratify his sexual desires. In such a case, the accused must be found not guilty even though he was negligent.[15]

This latter instruction more accurately describes the relationship between the specific intent required for the charged offense and the defense of accident, without inadvertently shifting the burden of proof to the accused to establish an innocent *mens rea*.[16] It also raises the larger question of whether the accident defense is, for practical purposes, superfluous when the accused is charged with a specific intent offense. Major Milhizer.

Determining When a False Claim Is Made

Introduction

In *United States v. Thomas*[17] the Army Court of Military Review considered the scope of the offense of making a false claim.[18] Specifically, the court addressed whether the accused's act of completing and submitting a "Winner of Bingo Jackpot" statement constituted making a false claim even though the accused personally did not submit the statement to someone authorized to pay the claim and never followed through with his attempt to collect the winnings. Before reviewing the *Thomas* decision in detail, a brief summary of the facts in that case and the law pertaining to making a false claim is appropriate.

The Facts in Thomas

The accused in *Thomas* had a continuing relationship with Sergeant First Class (SFC) Henry that revolved, at least in part, around bingo. SFC Henry was employed after duty hours at an officers' club in Germany.[19] His duties included selling bingo cards and managing bingo games at the club. Although SFC Henry was prohibited from participating in the games because of his position, he nonetheless regularly played bingo even while conducting the games.[20] To facilitate his playing bingo while managing the game, SFC Henry made an arrangement with the accused to secure SFC Henry's winnings. If SFC

[7] United States v. McFarlin, 19 M.J. 790 (A.C.M.R.), *petition denied*, 20 M.J. 314 (C.M.A. 1985). *See generally* Milhizer, *Mistake of Fact and Carnal Knowledge*, The Army Lawyer, Oct. 1990, at 4, 7-8 (discussing several sexual offenses requiring specific intent, including indecent assault).

[8] Manual for Courts-Martial, United States, 1984, Part IV, para. 63b(2) [hereinafter MCM, 1984].

[9] For a general discussion of the accident defense, see TJAGSA Practice Note, *The Defense of Accident: More Limited Than You Might Think*, The Army Lawyer, Jan. 1989, at 45.

[10] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(f) discussion [hereinafter R.C.M.]. The Manual provides further that "death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable." R.C.M. 916(f).

[11] United States v. Ferguson, 15 M.J. 12, 17 (C.M.A. 1983); *see* United States v. Tucker, 38 C.M.R. 349 (C.M.A. 1968); United States v. Redding, 34 C.M.R. 22 (C.M.A. 1963).

[12] The court observed that the defense did not object to or request modification of the instructions, that the government's case was strong, and that the instructions as a whole were adequate. *Rodriguez*, 31 M.J. at 157 (citing United States v. Hargrove, 25 M.J. 68 (C.M.A. 1987), *cert. denied*, 488 U.S. 826 (1988)).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See generally* United States v. Stafford, 22 M.J. 825 (N.M.C.M.R. 1986) (discussing shifting the burden of proof for the alibi defense).

[17] 31 M.J. 517 (A.C.M.R. 1990).

[18] *See* UCMJ art. 132.

[19] *Thomas*, 31 M.J. at 517.

[20] *Id.* at 517-18.

Henry's card was a winner, he would slip it to the accused, who would shout "bingo" and collect the prize.[21] The accused would turn over the winnings to SFC Henry, who would give the accused a small portion of the winnings as compensation. This arrangement continued for several months.[22]

The false claim charge arose when SFC Henry had the winning card on "Jackpot Night." He passed the winning card to the accused, who called "bingo" as requested by SFC Henry. The accused then completed a winning statement form[23] given to him by the bingo game cashier.[24] He later returned the form to the cashier with the winning card. The cashier told the accused to pick up his $5000 jackpot within five days at the Central Accounting Office. The winning statement form thereafter was forwarded to the Central Accounting Office, where it was processed and held. The accused, however, never went to claim his winnings. He ultimately confessed to his misconduct.

Making False Claims Generally

Article 132 of the Uniform Code of Military Justice (UCMJ)[25] proscribes frauds against the United States, including making false claims.[26] The 1984 Manual for Courts-Martial provides that the offense of making a false claim has three elements of proof.

> (a) That the accused made a certain claim against the United States or an officer thereof;
>
> (b) That the claim was false or fraudulent in certain particulars; and
>
> (c) That the accused knew[27] that the claim was false or fraudulent in these particulars.[28]

A "claim" is defined as "a demand for a transfer of ownership of money or property."[29] The writing that comprises the claim need not be an instrument that complies with federal laws and regulations, nor must it constitute a legal basis for an executive branch of the government to disburse funds.[30] A "requisition[] for the mere use of property," however, does not constitute a claim.[31] Similarly, claims within the scope of article 132 do not include claims made "against an officer of the United States in that officer's private capacity."[32] As the Manual explains, article 132 reaches only "claims against the United States or any officer thereof as such."[33]

Whether a claim actually is "made" is a distinct legal issue. "Making" a claim has been defined as "asking or demanding payment."[34] The Manual instructs that merely writing "a paper in the form of a claim, without

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[21] *Id.* at 518.

[22] For his part in this scheme, SFC Henry was convicted of larceny on divers occasions and sentenced, *inter alia*, to a bad-conduct discharge and confinement for four months. *Id.* at 518 n.2. The accused's sentence included a bad-conduct discharge but no confinement. *Id.* at 517, 519.

[23] Dep't of Army, Form 2490, Winner of Bingo Jackpot (Statement) (Aug. 1980).

[24] The form is reproduced as an appendix to the court's opinion in *Thomas*, 31 M.J. at 520. As the appendix reflects, the accused printed his name, social security number, and unit address on the form. *See id.* at 518.

[25] For a good discussion of the historical development of UCMJ article 132, see *id.* at 518-19.

[26] Article 132 provides:

> Any person subject to this chapter—
>
> (1) who, knowing it to be false or fraudulent—
>
> (a) makes any claim against the United States or any officer thereof; or
>
> (b) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof;
>
> (2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—
>
> (a) makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;
>
> (b) makes any oath to any fact or to any writing or other paper knowing the oath to be false; or
>
> (c) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;
>
> (3) who, having charge, possession, custody, or control of any money, or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or
>
> (4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;
>
> shall, upon conviction, be punished as a court-martial may direct.

[27] *See generally* MCM, 1984, Part IV, para. 58c(1)(c); United States v. Walthers, 28 C.M.R. 164 (C.M.A. 1959).

[28] MCM, 1984, Part IV, para. 58b(1).

[29] *Id.*, Part IV, para. 58c(1)(a).

[30] United States v. Chaney, 35 C.M.R. 692, 695 (C.G.B.R. 1965).

[31] MCM, 1984, Part IV, para. 58c(1)(a).

[32] *Id.*

[33] *Id.*

[34] United States v. Thompson, 24 C.M.R. 553 (A.F.B.R.), *petition denied*, 24 C.M.R. 311 (C.M.A. 1957) (citing United States v. Bittinger, 24 F. Cas. 1150 (W.D. Mo. 1875) (No. 14,599)).

any further act to cause the paper to become a demand against the United States or an officer thereof, does not constitute making a claim."[35] On the other hand, "any act of placing the claim in official channels constitutes making a claim, even if that act does not amount to presenting a claim."[36]

The Court of Military Appeals has recognized that the line which separates merely preparing a false claim from unlawfully making a false claim is somewhat imprecise. As the court observed in *United States v. Steele*,[37]

> some act, not necessarily amounting to presentment for payment, is necessary before a writing can be considered a claim. Undoubtedly this act would be one which would start the claim in circulation in official channels. We need not determine precisely what acts would be necessary to do this. All we need determine is whether from a fair interpretation of the language of this specification there is alleged something which states more than that accused was merely preparing to commit an offense.[38]

The courts and boards have applied this guidance in several cases. In *United States v. Couch*,[39] for example, the Air Force Court of Military Review held that a specification which alleged that the accused knowingly prepared for presentment, to an officer duly authorized to approve payment, a false dependent travel voucher stated the offense of making a false claim within the definitions of article 132.[40] In *United States v. Thompson*[41] the Air Force Board of Review concluded that the accused made a false claim when he knowingly prepared false certificates—military payroll money lists—reflecting that he was entitled to aviation pay and then submitted the certificates to an officer authorized to make payment.[42] More recently, the Coast Guard Court of Military Review, in *United States v. Cunningham*,[43] affirmed the accused's conviction for making a false claim and related offenses, when the accused received a substantial loan based upon a knowingly falsified request for unneeded ship repairs. The accused intended to falsify later documents indicating completion of the repairs so that he would be paid money for work not accomplished.[44]

In *Steele*,[45] the Court of Military Appeals determined that a specification was sufficient to state the offense of making a false claim when it alleged that the accused prepared a knowingly falsified request for commutation of rations for presentment to the commanding general, who was the official authorized to approve the claim.[46] The court found that the specification was adequate even though it did not state that the request was presented by the accused personally to the commanding general, as opposed to the accused placing it in administrative channels that would lead to its eventual presentation to the commanding general. The court concluded that, in either case, the accused's conduct would amount to making a false claim.

As these cases indicate, the offense of making a false claim occurs when the accused sends forward into official channels, or otherwise releases possession of, a knowingly falsified claim that he or she reasonably believes will reach an official who is authorized to pay the claim. Accordingly, "it is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment."[47] Actually, an article 132 violation can occur even when the accused makes a false claim after receiving the payment that is claimed when the claim is submitted to perfect the prior payment.[48]

The Holding in Thomas

Consistent with the foregoing authorities, the court in *Thomas* found that the accused "fraudulently claimed the bingo jackpot by completing the winnings statement form which placed it in official channels for processing and ultimate payment by the Central Accounting Office."[49]

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[35] MCM, 1984, Part IV, para. 58c(1)(b).

[36] *Id.* For a definition of "presenting a false claim," see *id.*, Part IV, para. 58c(2)(b). For a discussion of the difficulty in distinguishing between making a false claim and presenting a false claim, see *Thompson*, 24 C.M.R. at 557.

[37] 9 C.M.R. 9 (C.M.A. 1953).

[38] *Id.* at 12.

[39] 2 M.J. 286 (A.F.C.M.R. 1976).

[40] *Id.* at 288.

[41] 24 C.M.R. 553 (A.F.B.R.), *petition denied*, 24 C.M.R. 311 (C.M.A. 1957).

[42] *Id.* at 556-57.

[43] 27 M.J. 899 (C.G.C.M.R. 1989).

[44] *Id.* at 901.

[45] 9 C.M.R. 9 (C.M.A. 1953).

[46] *Id.* at 12-13.

[47] MCM, 1984, Part IV, para. 58c(1)(b).

[48] United States v. Ward, 33 C.M.R. 215, 220 (C.M.A. 1963).

[49] *Thomas*, 31 M.J. at 519. As the court correctly observed, the accused's claim was made "against an instrumentality of the United States." *Id.* (citing Standard Oil Co. of Cal. v. Johnson, 316 U.S. 481 (1982)).

He therefore made a false claim within the purview of article 132. As the court implicitly concluded, the accused's failure ultimately to receive the winnings he claimed did not affect his guilt for making a false claim.[50] Likewise, the accused was guilty of making a false claim even though he personally did not present the claim to the officials authorized to pay it.[51] The offense occurred when the accused released possession of the false claim, reasonably believing that it would reach an individual authorized to pay the claim. No further action, such as formal presentment, was required.[52]

Conclusion

Article 132 is a comparatively little used—perhaps underused—means of redressing fraudulent conduct. It is also a complex and sometimes confusing statute. Given the increasing attention to procurement fraud and similar misconduct,[53] military practitioners must become familiar with the scope and limitations of article 132 in general, and with the making of a false claim in particular. Major Milhizer.

Indecent Acts with Another and the Need for Touching

Introduction

The Army and Air Force Courts of Military Review recently split on whether masturbation in the presence of another adult—when, even though the accused physically does not touch the other person, the other person "participates" in the accused's conduct—constitutes an indecent act with another[54] or the less serious offense of indecent exposure.[55] The Army Court of Military Review, in *United States v. Murray-Cotto*,[56] concluded that physical contact was not required for the offense of indecent acts with another. The Air Force Court of Military Review, however, in *United States v. Jackson*,[57] decided that physical contact was necessary for indecent acts with another and thereby affirmed the accused's conviction for the lesser included offense of indecent exposure.

This note will examine the relative merit of these two decisions. Before discussing the cases in detail, a brief review of the Manual for Courts-Martial paragraphs pertaining to indecent acts and related offenses is necessary.

Indecent Acts and Indecent Exposure in the Manual

As noted above, indecent acts with another is punished as a violation of UCMJ article 134, the general article.[58] The Manual provides that this offense has three elements of proof:

> (1) That the accused committed a certain wrongful act with a certain person;
>
> (2) That the act was indecent;[59] and
>
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[60]

A related and more serious offense is indecent acts or liberties with a child, which also is proscribed by article 134.[61] This crime differs from indecent acts with another in several important respects. First, indecent acts or liberties with a child is a specific intent offense;[62] indecent acts with another, on the other hand, requires proof that the accused have only a general criminal *mens rea*.[63] Second, indecent acts or liberties with a child requires that the victim be under sixteen years of age;[64] indecent acts

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[50] *See* MCM, 1984, Part IV, para. 58c(1)(b).

[51] *See Steele*, 9 C.M.R. at 12-13.

[52] *See* MCM, 1984, Part IV, paras. 58c(1)(b), (2)(b). *See generally Thompson*, 24 C.M.R. at 557.

[53] *See, e.g., Cunningham*, 27 M.J. 899 (C.G.C.M.R. 1989). *See generally* Post & Mason, *Attacking Fraud, Waste, and Abuse at the Installation Level: A Model*, The Army Lawyer, Oct. 1986, at 18, 20.

[54] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 90.

[55] *See* UCMJ art. 134; MCM, 1984, Part IV, para. 88.

[56] 25 M.J. 784 (A.C.M.R.), *petition denied*, 26 M.J. 322 (C.M.A. 1988).

[57] 30 M.J. 1203 (A.F.C.M.R. 1990).

[58] *See generally* TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66 (discussing UCMJ art. 134 generally).

[59] The Manual defines "indecent" as signifying "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprive the morals with respect to sexual relations." MCM, 1984, Part IV, para. 90c. For a further discussion of the meaning of "indecent," see TJAGSA Practice Note, *Defining and Alleging Indecent Language*, The Army Lawyer, Apr. 1991, at ___ (discussing United States v. French, 31 M.J. 57 (C.M.A. 1990)).

[60] MCM, 1984, Part IV, para. 90b.

[61] *See id.*, Part IV, para. 87. The maximum punishment for indecent acts with a child is a dishonorable discharge, total forfeitures, and confinement for seven years. *Id.*, Part IV, para. 87e. The maximum punishment for indecent acts with another is a dishonorable discharge, total forfeitures, and confinement for five years. *Id.*, Part IV, para. 90e. Indecent acts with another is a lesser included offense of indecent acts or liberties with a child. *Id.*, Part IV, para. 87d(1).

[62] This offense requires proof that the accused specifically intended to arouse, appeal to, or gratify the lust, passions, or sexual desires of himself, the child, or both. United States v. Orben, 28 M.J. 172 (C.M.A. 1989); MCM, 1984, Part IV, para. 87b(1)(d) & (2)(d). *See generally* TJAGSA Practice Note, *Displaying Nonpornographic Photographs to a Child Can Constitute Taking Indecent Liberties*, The Army Lawyer, Aug. 1989, at 40.

[63] *See* MCM, 1984, Part IV, para. 90b. *See generally* United States v. Annal, 32 C.M.R. 427 (C.M.A. 1963).

[64] MCM, 1984, Part IV, para. 87b(1)(b) & (2)(d).

with another, however, does not.[65] Third, the Manual provides that for indecent acts or liberties with a child, the victim cannot be the spouse of the accused;[66] on the other hand, the same requirement is not recognized expressly in the Manual for indecent acts with another.[67]

Another potential difference between these offenses—which is central to the courts' disagreement in *Murray-Cotto* and *Jackson*—concerns the need for physical contact between the accused and the victim. The Manual expressly provides that indecent liberties with a child does not require physical contact between the accused and the victim.[68] The acts constituting the "liberties," however, "must be taken in the presence of the child."[69] The Manual's discussion of indecent acts with another is silent as to whether physical contact is required.[70]

The less serious offense of indecent exposure also is proscribed by article 134.[71] Indecent exposure requires willful,[72] public[73] exposure under indecent circumstances.[74] Negligent exposure is not sufficient.[75] Physical contact with, or in the "presence" of, another is not required. The courts historically have recognized that indecent exposure is a lesser included offense of indecent acts or liberties with a child and indecent acts with another.[76]

As the above discussion reflects, the Manual expressly provides that indecent liberties with a child does not require physical contact between the accused and the victim. The victim's "presence," nonetheless, is required. The Manual also is clear that indecent exposure does not require touching by, or the "presence" of, another. The Manual is not clear, however, on whether physical touching is required for the "intermediate offense"[77] of indecent acts with another. This was the issue addressed by the courts in *Murray-Cotto* and *Jackson*, with differing results.

Indecent Acts as Addressed by the Court of Military Appeals

The Court of Military Appeals long has recognized that the offense of indecent liberties with a child does not require physical contact between the accused and the victim. In its 1953 opinion in *United States v. Brown*,[78] the court affirmed the accused's conviction for indecent liberties with a child by exposing his penis to two young bicyclists while driving by them in an automobile.[79] The court reached a similar conclusion some thirty-three years later in *United States v. Ramirez*,[80] in which the accused's misconduct consisted of masturbating at a playground in the presence of two minor children.[81] Actually, the court repeatedly has affirmed convictions for indecent liberties with a child when no physical contact between the accused and the victims was alleged or proven.[82]

In contrast to these many cases involving indecent liberties with a child, few decisions by the Court of Military

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[65] *Id.*, Part IV, para. 90b.

[66] *Id.*, Part IV, para. 87b(1)(b), (2)(b).

[67] *Id.*, Part IV, para. 90b.

[68] *Id.*, Part IV, para. 87b(2), c(2). Indecent acts with a child, in contrast to indecent liberties with a child, requires physical contact between the accused and the victim. *Id.*, Part IV, para. 87b(1); *see* United States v. Payne, 41 C.M.R. 188 (C.M.A. 1970) (placing hand between child's legs).

[69] MCM, 1984, Part IV, para. 87c(2).

[70] *See generally id.*, Part IV, para. 90.

[71] *See id.*, Part IV, para. 88; United States v. Burbank, 37 C.M.R. 955 (A.F.B.R. 1967). Indecent exposure has three elements of proof:

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

(3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, 1984, Part IV, para. 88b. The maximum punishment for indecent exposure is a bad-conduct discharge, total forfeitures, and confinement for six months. MCM, 1984, Part IV, para. 88e.

[72] *See* United States v. Stackhouse, 37 C.M.R. 99 (C.M.A. 1987); United States v. Manos, 25 C.M.R. 238 (C.M.A. 1958); MCM, 1984, Part IV, para. 88c (willful means intentional exposure to public view).

[73] *See* United States v. Moore, 33 C.M.R. 667 (C.G.B.R. 1963). *See generally* United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989). These cases indicate that the exposure must be in public view—that is, where the public is reasonably likely to see the exposure—but that it need not occur in a public place.

[74] *See generally* United States v. Caune, 46 C.M.R. 200 (C.M.A. 1973) (nudity is not per se indecent).

[75] MCM, 1984, Part IV, para. 88c; *see Stackhouse*, 37 C.M.R. at 99.

[76] *See generally* TJAGSA Practice Note, *supra* note 62, at 40 (and the authorities cited therein). Interestingly, the Manual is silent as to whether indecent exposure is a lesser included offense of indecent acts or liberties with a child and indecent acts with another. *See* MCM, 1984, Part IV, paras. 87d, 90d.

[77] "Intermediate," as used in this context, refers to the potential maximum punishment for indecent acts with another. This punishment is more severe than the maximum punishment for indecent exposure, but less severe than the punishment available for indecent acts or liberties with a child. *See supra* notes 61, 71.

[78] 13 C.M.R. 10 (C.M.A. 1953).

[79] *Id.* at 11.

[80] 21 M.J. 353 (C.M.A. 1986). In *Ramirez* the indecent liberties offense was alleged as a violation of UCMJ article 133 (conduct unbecoming an officer and a gentleman).

[81] *Id.* at 355.

[82] *E.g.*, United States v. Orben, 28 M.J. 172 (C.M.A. 1989); United States v. Scott, 21 M.J. 345 (C.M.A. 1986).

Appeals directly have addressed whether indecent acts with another requires physical contact. In the most recent case,[83] *United States v. Thomas*,[84] the accused was charged with one specification of indecent liberties. The specification alleged that the accused, with the intent of gratifying his lust, engaged in a variety of activities with three young girls, including dancing in the nude in front of them, removing the clothes from two of them, chasing the children around a room, and asking them to touch him.[85] The accused was found guilty, by exceptions and substitutions, of the general intent offense of indecent acts with another by "removing his own clothing and dancing nude in front of"[86] the three children. Therefore, even though the victims were children, the accused was convicted of indecent acts with another when no physical contact between himself and his victims occurred.

The court in *Thomas* affirmed the accused's conviction. As the court explained, "The offense of committing indecent acts with another requires that the acts be done in *conjunction or participation with another person.*"[87] In distinguishing between the accused's conduct and the less serious offense of indecent exposure, the court wrote,

> Here, the "acts" of playing games with these young children, acting out the role of nude models, and dancing with them, were, as [the accused] admitted, indecent. It is the *participation* of [the accused] with the children in the performance of the indecent acts which distinguishes it from indecent exposure of [the accused's] person to the children. It was much more than merely exposing himself to an unwilling nonparticipant.[88]

Accordingly, the court held that physical touching between the accused and the victims was not required for indecent acts with another.

The Cases of Murray-Cotto *and* Jackson

In *United States v. Murray-Cotto*,[89] decided in 1988, the Army Court of Military Review concluded that the accused's conduct constituted an indecent act with another. The accused drove his car toward a seventeen-year-old female bicyclist, forcing her to the side of the road.[90] When the woman looked at the accused, she saw that his fly was open and he was masturbating. The accused shouted something to the woman[91] and then drove away. Two days later, the accused again drove by the same woman while she was walking along a roadway. He again forced her to the side of the road. Although the woman looked away from the accused upon recognizing him, she did observe that the accused's penis was exposed.

On appeal, the defense contended that the accused's conduct constituted only indecent exposure because he had no physical contact with the victim and she did not participate in the acts. The Army Court of Military Review, relying upon *Thomas*, disagreed. The Army court wrote that the "offense of indecent acts with another does not require physical contact between the perpetrator and the victim. Rather, it 'requires acts be done in conjunction or participating with another person.'"[92] Finding that the accused's acts of shouting at the victim and forcing her to the side of the road caused her to "participate" with him, the court affirmed the accused's conviction of indecent acts with another.

United States v. Jackson,[93] decided by the Air Force Court of Military Review last year, has roughly similar facts. The accused in *Jackson* pleaded guilty to an indecent act with another "by willfully exposing his penis [to a woman] ... at the base library."[94] Although the reported facts are somewhat sketchy, the accused apparently saw an "attractive" adult woman in a library.[95] He then exposed his penis and began masturbating while watching her.[96] The accused continued to masturbate as

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[83] For an earlier discussion of this issue, see United States v. Holland, 31 C.M.R. 30 (C.M.A. 1961) (convictions for indecent acts with another affirmed when accused induced an enlisted member to disrobe in his presence and pose in various stages of undress, and then attempted to induce another enlisted member to disrobe in his presence).

[84] 25 M.J. 75 (C.M.A. 1987).

[85] *Id.* at 75 n.1.

[86] *Id.*

[87] *Id.* at 76 (emphasis in original).

[88] *Id.* at 76-77 (emphasis in original).

[89] 25 M.J. 784 (A.C.M.R.), *petition denied*, 26 M.J. 322 (C.M.A. 1988).

[90] *Murray-Cotto*, 25 M.J. at 785.

[91] The accused shouted in English; the woman, however, was German. *Id.*

[92] *Id.* (quoting *Thomas*, 25 M.J. at 76) (emphasis deleted).

[93] 30 M.J. 1203 (A.F.C.M.R. 1990).

[94] *Id.* at 1204.

[95] *Id.* at 1206, 1207 (Blommers, J., concurring in part, dissenting in part).

[96] *Id.* at 1204.

he followed the woman down at least one aisle in the library.[97] The Air Force court's opinion indicates that the woman saw the accused and realized what he was doing.[98]

The majority in *Jackson* held that the accused's conduct did not constitute indecent acts with another, and derivatively that *Murray-Cotto* was decided incorrectly, for three reasons. First, the *Jackson* court found that the accused's acts were not, as the Manual required, done "with another."[99] The court observed that the victim was not the accused's coactor or co-conspirator, but instead was, at best, the "inspiration" for his "self-abuse."[100] Second, the court observed that although the Manual expressly recognizes that physical contact is not necessary for indecent acts with a child, the same is not true for indecent acts with another. The court therefore concluded that the drafters of the Manual intended that physical contact be required for the latter offense.[101] Third, the court found that *Murray-Cotto* was not persuasive authority because it rested "upon precedents involving indecent acts with children."[102]

Jackson *Criticized*

The reasons set forth by the court in *Jackson*, in support of its holding that indecent acts with another requires touching, are not persuasive. First, the court's strict interpretation of the Manual's language pertaining to indecent acts misconstrues the scope of the President's authority under UCMJ articles 36 and 56. Military appellate courts, including the Court of Military Appeals, repeatedly have refused to be bound by language in the Manual addressing substantive criminal law.[103] The courts have determined in these cases that the President did not have the authority to define the scope of crimes under the UCMJ, concluding that this authority is statutory in nature and that it therefore resides with Congress. The *Jackson* court's reliance on a strict reading of the language in the Manual pertaining to indecent acts ignores these limitations.

The Manual provides that indecent acts with another requires, as an element of proof, that the "accused committed a certain wrongful act with a *certain person*."[104] Yet, in *United States v. Sanchez*[105] the Court of Military Appeals affirmed the accused's conviction for indecent acts for misconduct with a chicken. In *United States v. Mabie*[106] the Army Court of Military Review likewise affirmed the accused's conviction for indecent acts with a corpse, even though a corpse is clearly not "another" within the legal meaning of that term.[107] In both cases the courts evaluated whether the accused's conduct satisfied the statutory requirements of article 134.[108] Whether or not the conduct comported with the explanation of the offense as found in the Manual was not dispositive.

The court in *Jackson* also mistakenly concluded that *Murray-Cotto* was not persuasive because it rested upon precedents involving indecent acts with children. Although the victims in *Thomas*[109] were children, the accused was convicted of indecent acts with another. He was, in other words, convicted of a general intent offense when no physical contact was shown. In addition to relying on *Thomas*, the court in *Murray-Cotto* also relied upon *United States v. Holland*,[110] which involved indecent acts with adults absent any touching. The court in *Jackson*, therefore has misconstrued the decisional authority relied upon in *Murray-Cotto*.

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[97] *Id.* at 1204, 1206-07. The stipulation of fact provided in part, "It was important to the accused, when he was masturbating and exposing himself, that the accused see [the woman]. That is why he continued to follow her. In essence, the accused made [the woman] an unwilling participant in his exposure and masturbation." *Id.* at 1207 (Blommers, J., concurring in part, dissenting in part).

[98] *Id.* at 1204.

[99] *Id.* (citing MCM, 1984, Part IV, para. 90b).

[100] *Jackson*, 30 M.J. at 1204.

[101] *Id.* at 1205.

[102] *Id.*

[103] *E.g.*, United States v. Harris, 29 M.J. 169 (C.M.A. 1989) (resisting apprehension does not include fleeing apprehension, despite language in the Manual to the contrary); Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (President could not change substantive military law by language in the Manual designed to eliminate the defense of partial mental responsibility); United States v. Jackson, 26 M.J. 377 (C.M.A. 1988) (scope of false official statement offenses under military law expanded to include false or misleading responses given during official questioning of the accused even when the accused did not have an official duty to account, despite language in the Manual requiring that duty); United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (opinion of Everett, C.J.) (military law must recognize a defense of voluntary abandonment as to criminal attempts, even though the Manual's failure to recognize the defense could indicate an intent by the President to reject it); United States v. Omick, 30 M.J. 1122 (N.M.C.M.R. 1989) (drug distribution can occur without physical transfer of the drug, despite language in the Manual that suggests otherwise). *See generally* United States v. Johnson, 17 M.J. 252 (C.M.A. 1984); United States v. Margelony, 33 C.M.R. 267 (C.M.A. 1963).

[104] MCM, 1984, Part IV, para. 90b(1) (emphasis added).

[105] 29 C.M.R. 32 (C.M.A. 1960).

[106] 24 M.J. 711 (A.C.M.R. 1987).

[107] *See generally* United States v. Thomas, 32 C.M.R. 278 (C.M.A. 1962).

[108] *See generally* TJAGSA Practice Note, *supra* note 58, at 66.

[109] 25 M.J. 75 (C.M.A. 1987).

[110] 31 C.M.R. 30 (C.M.A. 1961).

The dissenting opinion in *Jackson* points to two other factors in support of affirming the accused's conviction for indecent acts despite the absence of touching. The dissent first emphasized that the accused in *Jackson* pleaded guilty and discussed *Murray-Cotto* in detail during the associated providence inquiry.[111] Although a guilty plea does not obviate the requirement that the accused's admitted conduct must satisfy the elements of proof for the charged offense,[112] the courts have been increasingly reluctant to disturb convictions based upon facially provident guilty pleas.[113] This judicial reluctance is apparent with respect to indecent acts convictions,[114] and should be given at least some consideration in evaluating *Jackson*.

The dissent in *Jackson* also noted that the Court of Military Appeals denied petition for review in *Murray-Cotto*.[115] Of course, little if any precedential value generally can be ascribed to the denial of a discretionary review.[116] In the case of *Murray-Cotto*, however, the Court of Military Appeals first set aside the initial decision by the Army Court of Military Review and remanded the case to that court for further consideration of the precise question at issue in *Jackson*.[117] Given this unusual appellate history, the subsequent denial of petition in *Murray-Cotto* reasonably might be accorded some significance.

The only potentially supportable distinction between *Jackson* and *Murray-Cotto* is factual. One certainly could argue that the victim's participation in *Murray-Cotto* was more extensive and active than the victim's participation in *Jackson*. This comparison, however, is hard to make, given the sketchy facts that are reported in the *Jackson* opinion. Because *Jackson* is a guilty plea case, and the operative facts therefore are not controverted, the Air Force appellate court could have resolved a close factual question regarding the degree of the victim's participation in favor of the government.[118] Regardless of the *Jackson* court's resolution of this factual issue, however, *Murray-Cotto* remains good law and *Jackson* should be, at most, limited to its specific facts.

Conclusion

Murray-Cotto and *Jackson* present broad questions about the role of the Manual for Courts-Martial in defining criminal offenses, the degree to which appellate courts should look beyond a providence inquiry, and the significance of denying a petition for review. More specifically, these cases raise important questions concerning the scope of behavior proscribed as indecent acts with another and the relationship of that crime to other article 134 offenses, such as indecent exposure. These cases also leave unresolved whether the requirement for indecent acts with another that the victim must "participate" is more narrow than the requirement for indecent liberties with a child that the victim must be "present." Given the frequency with which indecent acts and related offenses are tried by courts-martial, practitioners should become familiar with *Murray-Cotto* and *Jackson*, and the many questions that they raise. Major Milhizer.

Requiring that Drug Distribution Be "Knowing"

Wrongful distribution of a controlled substance[119] has been construed broadly under military law to reach a variety of drug related activities. The 1984 Manual for Courts-Martial provides that the offense has two elements of proof:

> (1) That the accused distributed a certain amount of a controlled substance; and
>
> (2) That the distribution by the accused was wrongful.[120]

As the Manual explains, "'[d]istribute' means to deliver to the possession of another. 'Deliver' means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship."[121]

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[111] *Jackson*, 30 M.J. at 1206-07 (Blommers, J., concurring in part, dissenting in part).

[112] *See generally* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); United States v. Johnson, 25 M.J. 553 (A.C.M.R. 1987).

[113] *See* United States v. Harrison, 26 M.J. 474, 476 (C.M.A. 1988).

[114] *E.g.*, United States v. Woodard, 23 M.J. 514 (A.F.C.M.R. 1986), *set aside on other grounds*, 24 M.J. 514 (A.F.C.M.R. 1987).

[115] *Jackson*, 30 M.J. at 1207 (Blommers, J., concurring in part, dissenting in part).

[116] *See* United States v. Mahan, 1 M.J. 303, 307 n.9 (C.M.A. 1976) (denial of petition is of no precedential value). *See generally* UCMJ article 67(b)(3) (requiring that the Court of Military Appeals to grant petition "on good cause shown"). *But see* United States v. Arrington, 5 M.J. 756, 758-59 (C.M.A. 1978) (Cook, J., concurring).

[117] United States v. Murray-Cotto, 25 M.J. 434 (C.M.A. 1987) (summary disposition).

[118] *See generally* TJAGSA Practice Note, *An Order to "Disassociate" Held to Be Lawful*, The Army Lawyer, Aug. 1989, at 38, 39 (construing United States v. Wine, 28 M.J. 688 (A.F.C.M.R. 1988)).

[119] *See* UCMJ art. 112a.

[120] MCM, 1984, Part IV, para. 37b(3).

[121] *Id.* The same broad language was used in the revised version of the previous Manual. Manual for Courts-Martial, United States, 1969 (rev. ed.), para. 213g; *see* United States v. Brown, 19 M.J. 63, 64 (C.M.A. 1984).

This definition of "distribute" has been applied broadly by the military's courts. For example, wrongful distribution occurred when one coconspirator passed illegal drugs to another,[122] and when the accused returned drugs to his drug supplier.[123] Even the so-called *Swiderski* exception,[124] which has been recognized in dicta as applying in the military,[125] always has been distinguished on the facts and disallowed.[126] The term "distribute" actually has been given a broader definition by the courts than the Manual otherwise might suggest.[127]

A recent and related line of military cases have addressed the knowledge requirement for wrongful possession and use of illegal drugs.[128] First, in *United States v. Mance*,[129] the Court of Military Appeals held that, for an accused to be guilty of wrongful possession or use of a controlled substance, he or she must be aware of both the presence of the substance and its contraband nature.[130] The court later explained, in *United States v. Myles*,[131] that an accused's mistake regarding the specific type of controlled substance he used was not exculpatory, even if the accused thereby was exposed to a greater maximum punishment.[132] Finally, in *United States v. Stringfellow*,[133] the Navy-Marine Corps Court of Military Review held that an accused could be convicted of wrongfully using both the drug he intentionally used and other drugs that he inadvertently ingested at the same time.[134] None of cases, however, expressly considered whether the knowledge requirement for wrongful possession and use, as discussed in *Mance* and other cases,[135] applies equally to wrongful distribution.

This issue was addressed by the Court of Military Appeals in *United States v. Crumley*.[136] The court in *Crumley* concluded that wrongful distribution, and wrongful possession and use, have essentially the same knowledge requirements.[137]

In support of this conclusion, the court first observed that "wrongful possession is a lesser-included offense of wrongful distribution, and it would be anomalous to hold that knowledge was an element of the lesser included offense but not of the greater offense."[138] Of course, a similarly "anomalous" relationship sometimes exists with respect to attempt offenses.[139] Specifically, all attempt offenses require a special *mens rea*—that is, a specific intent—even when the greater offense that is being attempted requires only a general criminal intent.[140] Nevertheless, the court's observations regarding the relationship between greater and lesser-included

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[122] United States v. Tuero, 26 M.J. 106 (C.M.A. 1988); *see* United States v. Figueroa, 28 M.J. 580 (N.M.C.M.R. 1989); *see also* United States v. Blair, 27 C.M.R. 235 (C.M.A. 1959) (passing a marijuana cigarette back and forth for smoking constituted a wrongful transfer of marijuana).

[123] United States v. Herring, 31 M.J. 637 (N.M.C.M.R. 1990).

[124] United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977). In *Swiderski* the Second Circuit held that when two individuals simultaneously and jointly acquire possession of a drug for their own personal use, intending to share it together, their only crime is wrongful possession or use. They are not guilty of aiding and abetting the distribution to each other.

[125] United States v. Hill, 25 M.J. 411 (C.M.A. 1988).

[126] *E.g.*, United States v. Hill, 25 M.J. 441 (C.M.A. 1988); United States v. Viser, 27 M.J. 562 (A.C.M.R. 1988); United States v. Allen, 22 M.J. 512 (A.C.M.R. 1986).

[127] *E.g.*, *Omick*, 30 M.J. at 1122 (distribution can occur without a physical transfer of the drug). *See generally* TJAGSA Practice Note, *Does Drug Distribution Require Physical Transfer?*, The Army Lawyer, Nov. 1990, at 44. The courts have recognized that the term "distribution" has some limits. For example, wrongful distribution did not occur when drugs were transferred between government agents, and the accused neither ratified the sale nor accepted the proceeds therefrom. *See* United States v. Bretz, 19 M.J. 224, 227-28 (C.M.A. 1985). *See generally* United States v. Dayton, 29 M.J. 6 (C.M.A. 1989).

[128] *See also* UCMJ art. 112a.

[129] 26 M.J. 244 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988).

[130] *Mance*, 26 M.J. at 253-54. As the court explained, "for possession or use to be 'wrongful,' it is not necessary that the accused have been aware of the precise identity of the controlled substance, so long as he is aware that it is a controlled substance." *Id.* at 254. Therefore, if an accused believed that he possessed cocaine when he actually possessed heroin, he could be convicted of wrongful possession of heroin because he had the requisite knowledge to establish wrongfulness. *Id.*

[131] 31 M.J. 7 (C.M.A. 1990).

[132] The court wrote that, "in our view, this variation in the maximum punishments prescribed by the President for use of controlled substances does not alter the basic principle that the identity of the controlled substance ingested is not important in determining the wrongfulness of its use." *Id.* at 9-10 (footnote omitted). For a recent discussion of the issues addressed in *Myles*, see TJAGSA Practice Note, *Mistake of Drug is Not Exculpatory*, The Army Lawyer, Dec. 1990, at 36.

[133] 31 M.J. 697 (N.M.C.M.R. 1990).

[134] The accused in *Stringfellow* pled guilty to wrongfully using cocaine and amphetamine/methamphetamine. He said during the providence inquiry that he knowingly and voluntarily used cocaine and that he knew that this conduct was prohibited by law. He also told the military judge, however, that he did not realize at the time that the cocaine he was snorting had been laced with amphetamine/methamphetamine. *Id.* at 698. Finally, he told the military judge that he did not know it was "common practice" to mix these drugs. *Id.*

[135] *See also* United States v. Brown, 26 M.J. 266 (C.M.A. 1988) (positive urinalysis alone is insufficient to convict for wrongful drug use; the military judge must instruct that the use be knowing).

[136] 31 M.J. 21 (C.M.A. 1990).

[137] *Id.* at 23.

[138] *Id.* (footnote omitted).

[139] *See* UCMJ art. 80.

[140] *See, e.g.*, United States v. Roa, 12 M.J. 210 (C.M.A. 1982) (UCMJ article 118(3) murder does not require specific intent, but attempted murder under an article 118(3) theory requires specific intent); United States v. Sampson, 7 M.J. 513 (A.C.M.R. 1979) (rape does not require specific intent, but attempted rape requires specific intent). *See generally* Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131, 153 (1990).

offenses, with respect to the *mens rea* required for each, is generally accurate and supports its holding.[141]

Secondly, the court in *Crumley* noted that federal civilian prosecutions for wrongful drug distribution under section 841(a)(1) of title 21, United States Code, require proof of the defendant's knowledge and intent to distribute.[142] The court wrote that "although the language of Article 112a of the Uniform Code of Military Justice is less specific than its counterpart, we do not believe Congress intended that a servicemember could be subjected to the severe penalties imposable for wrongful distribution unless the Government proved knowledge on his part."[143] Despite the obvious problems with relying upon punishment limitations in the Manual as a basis for interpreting articles in the UCMJ,[144] the court's reasoning on this subject in *Crumley* seems both sound and logical.[145]

Crumley, however, addresses only the knowledge required of the drug distributor. It does not suggest that wrongful distribution under article 112a requires any particular kind of knowledge on the part of the recipient of the drugs.[146] As the Court of Military Appeals held in *United States v. Sorrell*,[147] "the offense of distribution can be accomplished when physical possession is transferred from one person to another, regardless of the knowledge or culpability of the recipient."[148] Consequently, the recipient's state of mind is not relevant in establishing a drug distribution offense.[149] Major Milhizer.

Defining and Alleging Indecent Language

In *United States v. French*[150] a divided Court of Military Appeals affirmed the accused's conviction for communicating indecent language to a child under sixteen years of age.[151] In sustaining the conviction, the court considered two important issues: (1) how indecent language is defined under the UCMJ; and (2) what a specification must contain to allege this offense. Before addressing these issues, a brief discussion of the pertinent facts in *French* is appropriate.

The accused in *French* was charged, *inter alia*, with taking indecent liberties with his fifteen-year-old stepdaughter by "asking her" if he could climb in bed with her.[152] Initially, the military judge agreed with the defense that the specification was deficient in alleging an indecent liberties offense.[153] The judge next considered whether the specification was nonetheless adequate to allege communicating indecent language to a child.[154] The defense contended that the language in the specification—"asking [the victim] if he [the accused] could climb into bed with her"—was not indecent per se. The defense argued further that the element requiring that the communication be "indecent" was not sufficiently alleged, either directly or by fair implication, and that, therefore, the defense lacked proper notice.[155] The military judge denied the defense motion and the accused proceeded to trial charged with communicating indecent language to a child. Contrary to the accused's pleas, he was found guilty of this offense.

Among the elements of proof for communicating indecent language is that the "language was indecent."[156] Accordingly, whether the specification in *French* adequately alleged the purported indecency of the accused's language would depend, in part, on the operative definition of "indecent language." As the Court of Military Appeals recognized in *French*, however, it "has never

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[141] *See generally* United States v. Baker, 14 M.J. 361 (C.M.A. 1983) (citing Jeffers v. United States, 432 U.S. 137, 152 n.20 (1977)).

[142] *Crumley*, 31 M.J. at 23.

[143] *Id.*

[144] *See generally* United States v. Emmons, 31 M.J. 108, 114-16 (Everett, C.J., concurring in the result) (Because Congress decides the elements of a crime and the President determines the maximum punishment, anomalous results sometimes occur); United States v. Lingenfelter, 30 M.J. 302 (C.M.A. 1990) (elements of drunk or reckless driving are not determined by presidentially prescribed aggravating circumstances that will expose the accused to a greater maximum punishment).

[145] *See generally* United States v. Sorrell, 23 M.J. 122, 124 (C.M.A. 1986).

[146] *See generally* United States v. Lampkins, 15 C.M.R. 31 (C.M.A. 1954) (one who unknowingly receives drugs is not guilty of wrongful possession of drugs).

[147] 23 M.J. 122 (C.M.A. 1986).

[148] *Id.* at 123; *accord* United States v. Earhart, 14 M.J. 511 (A.F.C.M.R. 1982), *aff'd*, 18 M.J. 421 (C.M.A. 1984).

[149] *Sorrell*, 23 M.J. at 123-24.

[150] 31 M.J. 57 (C.M.A. 1990).

[151] *See* UCMJ art. 134.

[152] *French*, 31 M.J. at 58; *see* MCM, 1984, Part IV, para. 87.

[153] The defense contended that the specification was inadequate because it did not alleged that the accused acted with the intent to gratify the lust or sexual desires of himself, the victim, or both. *French*, 31 M.J. at 58; *see* MCM, 1984, Part IV, paras. 87b(1)(d), (2)(d); United States v. Johnson, 35 C.M.R. 587 (A.B.R. 1965). As the Court of Military Appeals noted in *French*, specific intent is not required for the crime of communicating indecent language. *French*, 31 M.J. at 60.

[154] *French*, 31 M.J. at 58.

[155] The government conceded at trial that it did not charge communicating indecent language because it did not believe that the language was offensive. The government believed, however, that the accused's conduct was offensive. *Id.* Despite this position, the trial counsel did not join the defense motion to dismiss the charge of communicating indecent language.

[156] MCM, 1984, Part IV, para. 89b(2).

specifically addressed what constitutes indecent *language* under the Uniform Code of Military Justice."[157] Therefore, *French* presented a question of first impression to the Court of Military Appeals—that is, how is "indecent language" to be defined under military law?

In addressing this issue, the court in *French* first considered the definition of "indecent language" found in the Manual for Courts-Martial. The Manual describes "indecent language" as language "which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought."[158] The court thereafter considered several civilian[159] and military court decisions[160] that sought to define or construe the term "indecent." Based upon these cases, the court decided that, in addition to the definition of "indecent language" found in the Manual, the term "indecent language" refers to language that is "calculated to corrupt morals or excite libidinous thoughts."[161]

Although all three judges apparently concurred with this definition of "indecent language," they diverged over whether the specification at issue in *French* adequately alleged that the accused communicated indecent language. Judge Cox, who wrote the lead opinion, concluded that the specification sufficiently stated the charged offense because it "[a]s a whole ... convey[ed] an indecent message."[162] Judge Cox wrote that

> When an adult male asks his minor female stepdaughter if he can climb into bed with her, community standards are such that it is not unreasonable to accuse him of asking for something more than a restful sleep. Whether the accusation was true in this case was properly a question of fact for the members.[163]

Judge Sullivan concurred separately.[164] He initially observed that he "completely agree[d]" with Judge Cox's "excellent analysis."[165] Judge Sullivan added that even though "the language delineated in this specification might be innocent in some circumstances, it was alleged to be indecent in [the accused's] case."[166] Accordingly, Judge Sullivan found that the specification, in its entirety, was sufficient to state the offense of communicating indecent language.[167]

Chief Judge Everett forcefully dissented.[168] He wrote that the specification failed to allege the offense of communicating indecent language because the words used in the specification were not inherently indecent.[169] Chief Judge Everett observed that the majority incorrectly had relied upon the facts of record, as well as other circumstances not stated within the challenged specification, in support of its conclusion that the specification adequately alleged the accused to have communicated indecent language. Chief Judge Everett explained that if the government intended to rely on the surrounding circumstances to establish that the accused's communication was indecent, those circumstances must be alleged expressly within the four corners of the specification. Moreover, Chief Judge Everett concluded that the otherwise inadequate specification was not saved merely because it alleged that the accused's communication was "indecent." Rather, the word "indecent" as used in the specification merely stated a legal conclusion that did not specify any pertinent factual circumstances.

French teaches several important lessons. First, trial judges should consider tailoring the standard instruction on "indecent language" so that it conforms to the definitional guidance provided by *French*.[170] Second, trial practitioners should take Chief Judge Everett's comments

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[157] *French*, 31 M.J. at 59 (emphasis in original).

[158] *Id.*, Part IV, para. 89c. The Manual provides further that "[t]he language must violate community standards." *Id.*

[159] Jacobellis v. Ohio, 378 U.S. 184 (1964); Roth v. United States, 354 U.S. 476 (1957).

[160] United States v. Wainwright, 42 C.M.R. 997, 999 (A.F.C.M.R.), *aff'd on other grounds*, 43 C.M.R. 23 (C.M.A. 1970); *see* United States v. Castillo, 29 M.J. 145, 149-50 (C.M.A. 1989); United States v. Tindoll, 36 C.M.R. 350 (C.M.A. 1966); United States v. Holland, 31 C.M.R. 30 (C.M.A. 1961); United States v. Linyear, 3 M.J. 1027, 1029 (N.C.M.R. 1977), *petition denied*, 5 M.J. 269 (C.M.A. 1978) (citing United States v. Simmons, 27 C.M.R. 654 (A.B.R.), *petition denied*, 27 C.M.R. 512 (C.M.A. 1959)).

[161] *French*, 31 M.J. at 60.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 61 (Sullivan, J., concurring).

[165] *Id.*

[166] *Id.*

[167] *Id.* (citing *Holland*, 31 C.M.R. at 31).

[168] *Id.* at 61-64 (Everett, C.J., dissenting).

[169] *Id.* at 63 (Everett, C.J., dissenting).

[170] Specifically, the words "calculated to corrupt morals or excite libidinous thoughts" should be added to the standard instructions that define indecent language. *See* Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-158 (C.1, 15 Feb. 1985) (standard instruction for communicating indecent language).

to heart—a better specification would allege the circumstances that render an otherwise innocuous communication indecent.[171] Finally, when the government has alleged a minimally tolerable specification, as it did in *French*, the defense should consider moving for a bill of particulars.[172] Nothing in *French* would prevent a military judge from granting that motion.[173] Major Milhizer.

Pleading Carnal Knowledge

In *United States v. Osborne*[174] the Navy-Marine Corps Court of Military Review addressed the adequacy of two carnal knowledge specifications.[175] Specifically, the court considered whether specifications that omit an express allegation of an element of proof for carnal knowledge—that the accused was not married to the victim[176]—thereby are rendered fatally deficient.[177] *Osborne* is the latest of many cases to consider the legal significance of this omission in a specification. Before examining *Osborne*, a brief review of the law pertaining to the adequacy of specifications generally is appropriate.

The seminal military case addressing the adequacy of specifications is *United States v. Sell*.[178] In *Sell* the Court of Military Appeals set forth a three-part test for assessing the adequacy of a specification:

> The true test of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.[179]

The military appellate courts always have construed the first component of the *Sell* test with some flexibility, finding specifications to be sufficient as long as all the elements of the charged offense are alleged either directly or by fair implication. In *United States v. Brown*,[180] for example, the Army Court of Military Review concluded that the terms "Patton Enlisted Men's Club" and "Mainz Officers' and Civilians' Open Mess" alleged a building or structure, by fair implication, for purposes of housebreaking.[181] Similarly, in *United States v. Lee*[182] the Navy-Marine Corps Court of Military Review found that the words "absent with desertion" fairly alleged that the accused's absence was without authority (AWOL)[183] when the words "without authority" were omitted from an AWOL specification.[184]

The "fair implication" test, however, is not a license to draft sloppy specifications. In *United States v. Minor*,[185] for example, a specification alleging a general disorder[186] was found to be fatally deficient. The accused, a staff sergeant and cadre member, was alleged to have wrongfully accepted money from a trainee and to have wrongfully engaged in commercial dealings with a

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[171] *See generally* United States v. Petree, 23 C.M.R. 233, 237 (C.M.A. 1957) (specification which alleged that the accused, a passenger, unlawfully left the scene of an accident failed to state an offense against the accused as a principal, when the specification had no language alleging how the accused aided and abetted the crime even though that language generally is not required).

[172] R.C.M. 906(b)(6).

[173] *See generally* United States v. Mobley, 31 M.J. 273 (C.M.A. 1990).

[174] 31 M.J. 842 (N.M.C.M.R. 1990).

[175] UCMJ art. 120 proscribes carnal knowledge as follows: "Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge." For a good discussion of the history of carnal knowledge under military law, see *Osborne*, 31 M.J. at 844-45. *See also* Milhizer, *Mistake of Fact and Carnal Knowledge*, The Army Lawyer, Oct. 1990, at 3.

[176] Carnal knowledge has the following three elements of proof:

(a) That the accused committed an act of sexual intercourse with a certain female;

(b) That the female was not the accused's wife; and

(c) That at the time of the sexual intercourse the female was under 16 years of age.

MCM, 1984, Part IV, para. 45b(2).

[177] The sample specification for carnal knowledge in the Manual does not include an express allegation that the accused and his partner were not married. *Id.*, Part IV, para. 45f(2). Following the sample specification in the Manual does not guarantee that the pleading is legally sufficient. *See* United States v. Strand, 20 C.M.R. 13, 17 (C.M.A. 1955).

[178] 11 C.M.R. 202 (C.M.A. 1953).

[179] *Id.* at 206.

[180] 42 C.M.R. 656 (A.C.M.R. 1970).

[181] *See* UCMJ art. 130; MCM, 1984, Part IV, paras. 56b(1), c(4). *See generally* TJAGSA Practice Note, *Housebreaking Includes More Than Breaking Into a House*, The Army Lawyer, Apr. 1989, at 56.

[182] 19 M.J. 587 (N.M.C.M.R. 1984), *petition denied*, 20 M.J. 322 (C.M.A. 1985).

[183] *See* UCMJ art. 86; MCM, 1984, Part IV, para. 10b(3)(b).

[184] *See* MCM, 1984, Part IV, para. 10f(2).

[185] 25 M.J. 898 (A.C.M.R. 1988).

[186] *See* UCMJ art. 134.

trainee.[187] The court found that although this conduct could violate article 134 under some circumstances, the specifications were deficient in that they "failed to demonstrate the proscribed character" of the accused's acts.[188] Similarly, in *United States v. Brown*[189] a disobedience specification[190] was found to be deficient because it failed to allege that the accused had "knowledge of" the order he purportedly disobeyed.[191] Likewise, in *United States v. Shober*[192] a specification relating to a charge of conduct unbecoming an officer and a gentleman,[193] alleging that the accused took "nude photographs," was deficient because it was "too vague and lack[ed] words of criminality."[194]

As the above cases suggest, the "fair implication" test has been applied in an ad hoc, fact-specific, and sometimes inconsistent manner. Perhaps this is illustrated best by two burglary[195] cases. In *United States v. Green*[196] the Army Court of Military Review found that the word "break" was sufficient to allege that the room entered by the accused was the room "of another," as required for burglary.[197] Subsequently, the Court of Military Appeals decided in *United States v. Knight*[198] that the words "burglariously enter" did not allege, by fair implication, that the accused's misconduct included the required "breaking and entering."[199] These decisions, like many cases addressing the sufficiency of specifications, cannot be reconciled easily.

The military's appellate courts have, over time, become more tolerant of incomplete or imperfectly drafted specifications. This trend is illustrated by the courts' approach to specifications lacking words of criminality.[200] Early cases found that specifications which omitted words of criminality were deficient.[201] Later cases were more tolerant of specifications lacking words of criminality—at least when the accused pleaded guilty and did not challenge the specifications at trial.[202] More recently, the courts have concluded that specifications omitting words of criminality are to be viewed with greater tolerance even if the accused contests his guilt[203] or challenges the adequacy of the specification at trial.[204]

Against this backdrop, the court in *Osborne* concluded that the carnal knowledge specifications at issue were adequate even though they failed to allege expressly that the accused was not married to the victims. The court reasoned that the circumstances in *Osborne* were similar to the circumstances in *Green*[205] and *Lee*,[206] in which the specifications were found to satisfy the "fair implication" test even though they failed to allege an element of proof expressly. In this regard, the court in *Osborne* found that the words "carnal knowledge" have a special significance under military law, and thus the term "encompasses ... all of the elements of the offense," including that the accused and his partner were not mar-

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[187] *Minor*, 25 M.J. at 899-900.

[188] *Id.* at 901.

[189] 25 M.J. 793 (N.M.C.M.R. 1987).

[190] *See* UCMJ art. 92.

[191] *Brown*, 25 M.J. at 794.

[192] 23 M.J. 249 (C.M.A. 1986) (summary disposition).

[193] *See* UCMJ art. 133.

[194] *Shober*, 23 M.J. at 250.

[195] *See* UCMJ at 129.

[196] 7 M.J. 966 (A.C.M.R.), *petition denied*, 8 M.J. 176 (C.M.A. 1979).

[197] *Green*, 7 M.J. at 967. In *Green* the defense argued that because the specification alleged that the room "belonged" to the accused's organization, the accused's having a right to enter the room was "entirely possible." *Id.*

[198] 15 M.J. 202 (C.M.A. 1983).

[199] *See* MCM, 1984, Part IV, paras. 55b(1), 55c(2), 55c(3). *See generally* TJAGSA Practice Note, *Burglary and the Requirement for a Breaking*, The Army Lawyer, Jan. 1990, at 32. Interestingly, *Knight* did not cite *Green*.

[200] Words of criminality include "wrongfully," "unlawfully," and "without authority." When alleged, they expressly indicate that otherwise lawful conduct violates the UCMJ.

[201] *E.g.*, United States v. Brice, 38 C.M.R. 134 (C.M.A. 1967) (drug possession specification that omitted the word "wrongfully" was fatally deficient).

[202] *E.g.*, United States v. Watkins, 21 M.J. 208 (C.M.A. 1986) (AWOL specification adequate even though the words "without authority" were omitted when accused pled guilty, did not challenge specification at trial, a crime reasonably was alleged, and no prejudice was shown); *see also* United States v. Brecheen, 27 M.J. 67 (C.M.A. 1988) (specifications alleging conspiracy to distribute drugs in a guilty plea case were adequate even though word "wrongful" was omitted, applying rationale of *Watkins*); United States v. Simpson, 25 M.J. 865 (A.C.M.R. 1988) (drug distribution specification omitting the "wrongfully" was sufficient in guilty plea case, in part, because other distribution specifications included words of criminality and specifications were drafted expressly under article 112a).

[203] United States v. Bryant, 28 M.J. 504 (A.C.M.R. 1989) (conspiracy to distribute drug specification sufficient when the word "wrongful" was omitted even though accused contested his guilt).

[204] United States v. Woods, 28 M.J. 318 (C.M.A. 1989) (specification alleging reckless endangerment for misconduct related to acquired immunodeficiency syndrome was adequate even though words of criminality were omitted and specification was challenged at trial).

[205] 7 M.J. 966 (A.C.M.R. 1979).

[206] 19 M.J. 587 (N.M.C.M.R. 1984).

ried to each other.[207] The accused's convictions for carnal knowledge, therefore, were affirmed.

Several other, unstated factors support the court's conclusion in *Osborne*. First, the accused pleaded guilty to the carnal knowledge charge and specifications and apparently did not challenge the adequacy of the specifications at trial. Although these circumstances do not compel the conclusion that the specifications were sufficient,[208] they clearly favor rejecting the accused's contention on appeal that the specifications were prejudicially inadequate.[209] Secondly, because the government followed the form specification for carnal knowledge, the defense's lacking fair notice on the elements of proof for that offense seems unlikely.[210] If the defense was uncertain whether the government somehow intended to depart from the black letter requirements of proof for carnal knowledge as set forth in the Manual, it could have moved at trial for a bill of particulars.[211]

Osborne does not mandate that trial judges deny timely defense motions challenging the sufficiency of imperfect specifications or asking that they be made more definite and certain. Actually, many trial judges may conclude that sloppily drafted specifications are fatally deficient, or at least erroneous, and require repreferral.[212] In addition to the obvious administrative consequences of that type of ruling,[213] a future conviction might be jeopardized by trial counsel's poor draftsmanship.[214] Major Milhizer.

Commuting Sentences—When Is Less Really More?

The convening authority has broad discretion in acting on the findings and sentence of a court-martial.[215] When taking action on the sentence, "[t]he convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased."[216]

The discussion to Rule for Courts-Martial (R.C.M.) 1107(d)(1) emphasizes that if the convening authority changes the form of an adjudged punishment, the change must be to a less severe punishment.[217] Stating this rule is simple; applying the rule, however, can be troublesome.

Waller v. Swift,[218] a recent decision by the Court of Military Appeals, provides guidance on how to determine if a commuted punishment actually is less severe. In *Waller* the court found the accused guilty of wrongful appropriation of government property and dereliction of duty in violation of UCMJ articles 121 and 92.[219] During the presentencing phase of trial, Waller made an unsworn statement. Waller asked the panel to consider his family and to adjudge a sentence that did not include confinement.[220] Waller's defense counsel reiterated that request in his sentencing argument, asking that the panel adjudge

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[207] *Osborne*, 31 M.J. at 845.

[208] *See supra* notes 203, 204, and accompanying text.

[209] *See generally supra* note 202 and accompanying text.

[210] For example, all attempt offenses have elements of proof relating to an overt act requirement. MCM, 1984, Part IV, para. 4b; *see* United States v. Byrd, 24 M.J. 286 (C.M.A. 1987). The courts, nonetheless, consistently have found the form specification for attempts, which does not expressly allege an overt act, to be adequate in all respects. United States v. Mobley, 31 M.J. 273 (C.M.A. 1990); United States v. Marshall, 40 C.M.R. 138, 143 (C.M.A. 1969). This is logical, because the defense need only refer to the black letter military law pertaining to attempts—which is set forth in the same paragraph of the Manual as the form specification for attempts—to ascertain the elements of proof for that offense. *See also* United States v. Vidal, 23 M.J. 319 (C.M.A. 1987) (standard form specification was sufficient to allege that accused raped victim as either a perpetrator or as an aider and abettor and, by inference, that accused was not married to victim). *But cf. Strand*, 20 C.M.R. at 17 (following sample specification in Manual does not guarantee that pleading is legally sufficient).

[211] *See* R.C.M. 906(b)(6) and discussion. *See generally Mobley*, 31 M.J. at 278.

[212] *See* R.C.M. 603(d).

[213] Other consequences include rereferral and, possibly, a new pretrial investigation. *See* R.C.M. 603(d) discussion.

[214] For example, a possible conviction may be lost to a speedy trial clock when the defense successfully challenges a specification and a new investigation is required. *See generally* R.C.M. 707(c)(5); United States v. Mickla, 29 M.J. 749 (A.F.C.M.R. 1989).

[215] R.C.M. 1107(b)(1) provides:

> The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency.

[216] R.C.M. 1107(d)(1).

[217] *Id.* discussion. Note also that the changed punishment must be one that the court-martial could have adjudged. For example, a bad-conduct discharge cannot be commuted to seven months of confinement if the court-martial was a special court-martial because the changed punishment of seven months' confinement would exceed the jurisdictional limit of the court.

[218] 30 M.J. 139 (C.M.A. 1990).

[219] *See* UCMJ arts. 92, 121. The accused had entered partial pleas, but was found guilty as originally charged.

[220] Waller stated:

> I would just like to be able to be discharged from the military under a dishonorable condition and go out and make a career. I feel I'm a competent individual. I can, you know, pick up my pieces and keep on going. If I get put away what do I have? I've got a lot of support out there that can't make it without me.

Waller, 30 M.J. at 140.

a punitive discharge and no confinement.[221] The members sentenced the accused to a bad-conduct discharge, forfeiture of $400.00 pay per month for one month, and reduction to the grade E-1. They did not adjudge any confinement.[222]

In the post-trial recommendation, the staff judge advocate recommended that the convening authority commute the bad conduct discharge to confinement for one year. The staff judge advocate explained that the Manual for Courts-Martial and case law supported this change.[223] The staff judge advocate added that changing the bad-conduct discharge to confinement for one year would serve larger, Army-wide interests. The staff judge advocate wrote: "[T]welve months confinement would be more visible to soldiers of the command and perhaps a better general deterrent than a sentence without confinement. Confinement would also better serve the societal goal of retribution because it is more immediate and tangible than a discharge."[224]

Concerning the "best interests" of the accused, the staff judge advocate continued:

> Additionally, confinement would be a benefit to society and the accused by preparing him for the transition to civilian life. He was engaging in criminal activity over a significant period of time. The counselling and rehabilitation available from the Army's confinement system would benefit this particular accused greatly. If we must release a thief to live in the civilian community, we must also shoulder some obligation to do what we can to rehabilitate the criminal.[225]

Waller's defense counsel objected to the proposed commutation of the bad-conduct discharge in his response to the post-trial recommendation.[226] The defense counsel stressed that R.C.M. 1107(d)(1) allows a convening authority to change a punishment to one of a different nature as long as the severity is not increased.[227] The defense counsel argued that the staff judge advocate's proposed action, would "as a practical matter result in more severe punishment."[228] Defense counsel argued that in Waller's case, the members had "sided" with the accused and had determined that *in this case* confinement was more severe than a punitive discharge.[229]

The convening authority ultimately followed the staff judge advocate's recommendation and approved a sentence that included confinement for twelve months, but no discharge.[230] Waller subsequently was confined,[231] but requested that his sentence to confinement be deferred pending his appeal.[232] After the convening authority denied the deferment request, Waller petitioned the Court of Military Appeals for extraordinary relief in the nature of habeas corpus.

The Court of Military Appeals directed that Waller be released from confinement immediately. In reaching this conclusion, the court first addressed the basis for granting

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[221] In contrast, the trial counsel argued for "the maximum sentence possible on both charges." The military judge instructed the panel that the maximum punishment was a dishonorable discharge, confinement for 10 years and six months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *Id.* at 140 n.2. Note that the accused asked for a "dishonorable discharge" and the defense counsel argued for a "punitive discharge." Both requests were errors although the issue was not addressed by the appellate court. If the defense is going to request a punitive discharge, it should request only a bad-conduct discharge, the less severe punitive discharge. *See* United States v. Dotson, 9 M.J. 542 (C.G.C.M.R. 1980); United States v. McMillan, 42 C.M.R. 601 (A.C.M.R. 1970).

[222] *Waller*, 30 M.J. at 140.

[223] *See* R.C.M. 1107(d)(1) discussion (bad-conduct discharge adjudged by special court-martial could be changed to six months' confinement); United States v. Darusin, 43 C.M.R. 194, 196 (C.M.A. 1971) ("replacement of an adjudged punitive discharge with confinement at hard labor for 1 year would not increase the severity of the sentence.").

[224] *Waller*, 30 M.J. at 140.

[225] *Id.*

[226] *See* R.C.M. 1106(f)(4).

[227] In exercising this power, the convening authority may: (1) Change a punitive discharge to a term of confinement (the discussion to R.C.M. 1107(d)(1) advises: "For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for six months (but not vice versa)."); (2) Change a punitive discharge to a term of confinement and forfeitures, *see, e.g.*, United States v. Brown, 32 C.M.R. 333 (C.M.A. 1962); United States v. Prow, 32 C.M.R. 63 (C.M.A. 1962)); (3) Change a fine to forfeitures and vice versa, *see* United States v. Brown, 1 M.J. 465 (C.M.A. 1976); (4) Change restriction and confinement, *see* R.C.M. 1003(b)(6) (establishing equivalency rate); (5) Change hard labor without confinement and confinement, *see* R.C.M. 1003(b)(7) (establishing equivalency rate); and (6) Change confinement on bread and water or diminished rations and confinement, *see* R.C.M. 1003(b)(9) (establishing equivalency rate).

[228] *Waller*, 30 M.J. at 141.

[229] *Id.*

[230] *Id.* at 142.

[231] UCMJ art. 57(b) provides, "Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial." In Waller's case, once the convening authority changed the sentence to include confinement, Waller was obligated to start serving that confinement immediately.

[232] UCMJ art. 57(d) authorizes the convening authority to defer service of the sentence to confinement. The accused has the burden of establishing that deferment is appropriate. *See* R.C.M. 1101(c).

extraordinary relief.[233] The court rejected the government's argument that extraordinary relief was not appropriate because the issue involved could be raised on direct review. The court wrote, "... it seems appropriate to consider that action [that is, the propriety of the commutation of the bad conduct discharge to a term of confinement] at this time, rather than to await direct appellate review when any relief granted would be of much less value."[234] The court recognized "the traumatic effect of confinement"[235] and that Waller might serve the entire term of confinement by the time normal appellate review ran its course. Delay would render any possible relief of little value. Although the approved sentence would provide Waller automatic appellate review,[236] the court exercised its extraordinary writ authority.

After determining that reviewing Waller's writ petition was appropriate, the court examined the legal basis for the convening authority's action. As its starting point, the court highlighted that a convening authority's power to commute a sentence is not absolute. The court wrote: "A basic theme of the Uniform Code of Military Justice is to prevent command influence. With this in mind, we are sure that Congress never intended that a convening authority would be free to exercise the power of commutation to increase the severity of a sentence."[237]

The court also reviewed R.C.M. 1107(d)(1) and its discussion. It stated, "One form of punishment may be changed to *a less severe punishment of a different nature*, as long as the changed punishment is one which the court-martial could have adjudged."[238] The court concluded that commutation means both *altering* and *reducing* punishment.

The court next turned to the issue of whether or not Waller's sentence to twelve months of confinement was less severe than the bad-conduct discharge adjudged at his general court-martial. In addressing this issue, the court wrote that while commuting a punitive discharge to a term of confinement is generally lawful, "in comparing two different species of punishment, it is not always apparent which is the more or the less 'severe'."[239] Accordingly, something more than a "mechanical comparison"[240] is necessary. The court held that each commutation must be evaluated with respect to each accused.[241]

Looking at the facts in Sergeant Waller's case, the appellate court found that the members of Waller's court-martial had viewed a punitive discharge as a penalty less severe than confinement.[242] The court held that the convening authority's action represented an unlawful increase in the sentence adjudged. The court then proceeded to dismiss the staff judge advocate's characterization of the "mitigation" action as "an exercise in semantics," and wrote: "The references in the staff judge advocate's recommendation to 'deterrent' and 'retribu-

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[233] The Court of Military Appeals has held that the All Writs Act, 28 U.S.C. §1651(a) (1982), empowers it to grant extraordinary relief in the nature of writs, generally, and the writ of habeas corpus, in particular. The All Writs Act provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.*

[234] *Waller*, 30 M.J. at 143.

[235] *Id.* at 142.

[236] *See* UCMJ art. 66(b)(1).

> The Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial—in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

Id.; UCMJ art. 67(a)(3) provides, "The Court of Military Review shall review the record in—all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted review."

In Waller's case, both the adjudged sentence and the changed sentence would qualify for automatic appeal at the Army Court of Military Review. Additionally, assuming he could establish "good cause," he would qualify for an appeal to the Court of Military Appeals. *See also* United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988) (granting review of a writ petition, rationalizing that the case possibly—at some point in the future—could reach the actual jurisdiction of the court).

[237] *Waller*, 30 M.J. at 143.

[238] *Id.*

[239] *Id.* (citing United States v. Hodges, 22 M.J. 260, 262 (C.M.A. 1986)).

[240] The court cited *Hodges* for the proposition that a "fixed table of substitutions" would be inappropriate. *See Hodges*, 22 M.J. at 262.

[241] *Waller*, 30 M.J. at 143-44.

[242] The Court of Military Appeals made this finding based upon the sentence that the defense had argued for at trial, the sentence that the government had argued for at trial, and the sentence that the members ultimately imposed. Note that the members could not be questioned about their deliberations. *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 606(b):

> *Inquiry into validity of findings or sentence.* Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith.

Did the members really believe that the adjudged bad-conduct discharge was less severe than confinement? Or, did they adjudge a punitive discharge because it was more severe than confinement? Consider that they found him guilty as charged, rather than accepting his partial pleas to lesser included offenses.

tion' are more consistent with the true—whether intended—effect of changing Waller's bad-conduct discharge to 12 months' confinement." The court directed that Waller be released from confinement immediately—after only forty-two days of confinement—and precluded reimposition of the punitive discharge.

Waller v. Swift provides several practical points regarding extraordinary writs and commutations of sentences. First, the writ of habeas corpus is a flexible instrument that permits petitioners to challenge illegal confinement on a variety of legal theories.[243] In *Waller* the court expressed strong concern for personal liberty and the need for immediate release of anyone subjected to illegal confinement.[244] Defense counsel should not underestimate the usefulness of this tool. It is especially useful in the military because command influence often directly affects personal liberty. The *Waller* court noted a hint of unlawful command influence and, as the military's highest appellate court, it takes its duty to prevent even the appearance of unlawful command influence seriously. This can and did provide the issue that the Court of Military Appeals could not resist but address.

The second point practitioners can learn from *Waller* concerns the standard for commutations—that is, the new punishment must be less severe *for that particular accused*.[245] What is less severe for one accused might be an increase for another. No fixed table of substitutions exists. Rather, each commutation must be analyzed for each accused.

Finally, *Waller* points out that defense counsel should note all objections to a proposed commutation in the R.C.M. 1106(f)(4) response to the post-trial recommendation. Except for plain error, objections not made are waived.[246] The response should explain in detail why the proposed commutation actually does not constitute a lessening of the punishment for that particular accused. The convening authority must review this R.C.M. 1106(f)(4) response before taking action.[247] Additionally, when an appellate court reviews the commutation, the court will consider the accused's views as expressed in the R.C.M. 1106(f)(4) response.[248] Major Cuculic and Major Park.[249]

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Note

Separation Agreements—Contracting for Unsatisfactory Alimony in Perpetuity?

Many soldiers and their spouses sign separation agreements before obtaining a divorce. Occasionally, one of the parties to the separation agreement will agree to pay more or accept less spousal support then they believe is proper or just under the circumstances. The party may do this willingly in return for concessions on other issues, or the party simply may capitulate to speed up the divorce process. In either case, the unhappy party believes that the unfavorable terms of the negotiated agreement can be adjusted by a court at a later date.

Frequently, these clients are correct in this assumption because courts generally retain jurisdiction over continuing orders and have the power to modify orders regarding the payment of alimony.[250] Careless drafting of a separation agreement and divorce decree, however, can deprive a court of the ability to modify an award of alimony and lock a client into paying or receiving unsatisfactory amounts of alimony indefinitely.

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[243] *See, e.g.*, Moore v. Akins, 30 M.J. 249 (C.M.A. 1990) (post-trial confinement of the petitioner after court of military review reversal); United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985) (petitioner challenged conditions of pretrial confinement); Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976) (petitioner sought review of basis of pretrial confinement).

[244] *Waller*, 30 M.J. at 142-43.

[245] *See also* United States v. Coleman, 31 M.J. 653 (C.G.C.M.R. 1990).

[246] *See* United States v. Goode, 1 M.J. 3, 6 (C.M.A. 1975); United States v. Hannan, 17 M.J. 115, 124 (C.M.A. 1984).

[247] R.C.M. 1107(b)(3)(A)(iii).

[248] The *Coleman* court noted:

> We will independently assess the effect of this action on the appellant, because the law is clear: if the modification results in an expansion of the sentence rather than a contraction, it is improper and must be voided. In so testing, the accused's views on whether the change is more severe or not, as set out in his response to the Staff Judge Advocate, warrant consideration as bearing on the ultimate characterization.

Coleman, 31 M.J. at 658.

[249] Major John J. Park, Jr. is a United States Army Reserve officer assigned as an Individual Mobilization Augmentee to the Criminal Law Division, TJAGSA.

[250] M. Silverman, R. Sovronsky, N. Erickson, Family Law and Practice § 52.01(1) (1990).

A court granting a divorce can "acknowledge," "ratify," or "approve" a separation agreement. When the court takes any of these actions, it explicitly recognizes the existence of the agreement and implicitly recognizes that it is valid. This may insulate from collateral attack terms of the agreement not covered or contradicted by the terms of the decree. Courts also can "incorporate" the agreement into a divorce decree. This action also will insulate the agreement from collateral attack—at least to the extent that the agreement's terms are not otherwise covered by the decree.

Finally, the court can "merge" the agreement into the decree. When a separation agreement is merged, it becomes part of the decree and ceases to exist as a contractual obligation of the parties. Thereafter, the "judgment of divorce ... controls the rights, privileges, and obligations of the respective parties."[251] Moreover, obligations set forth in the separation agreement may be modified by the court. This is in sharp contrast with "acknowledged" and "incorporated" agreements, which continue as contractual obligations that are not subject to a court's modification absent a showing of fraud or duress.[252]

Failing to seek merger of the separation agreement into the divorce decree can leave dissatisfied parties with an enforceable contract that cannot be modified and, at the same time, a modifiable court order that can. Some courts have held that in those cases, alimony under the court order remains modifiable.[253] Presumably, however, the party adversely affected by the modification of the alimony award can seek specific performance of the separation agreement.[254] Moreover, one court recently has held that unless a court specifically states that the divorce judgment is independently valid of a nonmerged separation agreement, "the separation agreement shall be binding and the divorce judgment is not enforceable or modifiable with respect to that matter."[255]

The issue of whether a court acknowledges, incorporates, or merges a separation agreement into a divorce decree should be addressed by the attorneys representing the parties in the divorce action. Particularly in "no-fault" jurisdictions, however, not all parties seeking a divorce are represented by an attorney. Accordingly, legal assistance attorneys should ensure that their clients understand that separation agreements may have vitality beyond the issuance of the divorce decree unless the court orders the agreement merged into the decree. To eliminate uncertainty on the issue, separation agreements should contain a recital of the intent of the parties regarding the continued vitality of the separation agreement's terms and conditions. Major Connor.

Consumer Law Note

Updated Listing of New Car Lemon Laws

State warranty laws for new cars—commonly referred to as "lemon laws"—have continued to grow in popularity. As described in a previous legal assistance consumer law note,[256] lemon laws are favored because most of them force dealers and manufacturers either to refund the purchase price of a new car or to replace the vehicle when a substantial defect occurs. Under the typical lemon law, a buyer may invoke this remedy when his or her new vehicle has been unavailable for thirty days or more during the first year of ownership or when the seller has made four unsuccessful attempts to correct a deficiency.[257]

The protections of lemon laws are now available in forty-six states and the District of Columbia.[258] They provide a powerful alternative to remedies available under the Uniform Commercial Code[259] and the Magnuson-Moss Warranty Act.[260] Any time a client's automobile has a substantial defect, an attorney should check these state lemon laws for possible relief. Major Pottorff.

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[251] Goldman v. Goldman, 543 A.2d 1304, 1306 (R.I. 1988).

[252] *See* Johnston v. Johnston, 465 A.2d 436 (Md. Ct. App. 1983); Knox v. Remick, 358 N.E.2d 432 (Mass. 1976); Ballin v. Ballin, 371 P.2d 32 (Nev. 1962).

[253] *See e.g.*, Murphy v. Murphy, 467 A.2d 129 (Del. Fam. Ct. 1983); Binder v. Binder, 390 N.E.2d 260 (Mass. App. Ct. 1979) (alimony in a divorce decree is modifiable when a duplicate alimony provision in a nonmerged separation agreement exists).

[254] *See* Andursky v. Andursky, 554 A.2d 571 (Pa. Super. Ct. 1989).

[255] Riffenburg v. Riffenburg, 17 Fam. L. Rep. (BNA) 1148 (R.I. Jan. 16, 1991).

[256] TJAGSA Practice Note, *Warranties: State Lemon Laws*, The Army Lawyer, July 1990, at 55.

[257] *Id.*

[258] *Sales of Goods and Services*, The Consumer Credit and Sales Legal Practice Series, app. I (1989) (listing the following state statutes: Alaska Stat. § 45.45.300; Ariz. Rev. Stat. § 44-1261; Cal. Civ. Code § 1793.2; Colo. Rev. Stat. § 42-12-101; Conn. Gen. Stat. § 42-179; Del. Code Ann., tit. 6 § 5001; D.C. Code, § 28-301, § 40-1301; Fla. Stat. Ann. § 681.102; Hawaii Rev. Stat. § 490:2-313.1; Idaho Code § 48-901; Ill. Rev. Stat. ch. 121-1/2, § 1201; Ind. Code § 24-5-13; Iowa Code Ann. § 322 E.1; Kan. Stat. Ann. § 50-645; Ky. Rev. Stat. Ann. § 367.860-.870 (Bobbs Merrill Supp.) (not considered a true "lemon" law); La. Rev. Stat. § 51:1941; Me. Rev. Stat. Ann. tit. 10 § 1161; Md. Com. Law Code Ann. § 14-1501, 14-1901; Mass. Gen. Laws Ann. Ch. 90 § 7N 1/2; Mich. Comp. Laws § 257.1401; Minn. Stat. § 325F.665; Miss. Code Ann. § 63-17-151; Vernon's Ann. Mo. Stat. § 407.560; Mont. Code Ann. § 61-4-501; Neb. Rev. Stat. § 60-2701; Nev. Rev. Stat. § 598.751; N.H. Rev. Stat. Ann. § 357-D; N.J. Rev. Stat. § 5612; N.M. Stat. Ann. § 57-16A-1; N.Y. Gen. Bus. Law § 198-a, N.Y. Veh. & Traf. Law §417-a; N.C. Gen. Stat. § 20-351; N.D. Cent. Code § 51-07-16; Ohio Rev. Code Ann. § 1345.71; Okla. Stat. Ann. tit. 901; Or. Rev. Stat. § 646.315; Pa. Cons. Stat. 1951 (Purdon); R.I. Gen. Laws § 31-5.2-1; S.C. Code Ann. § 56-28-10 (Law Co-op); Tenn. Code Ann. §§ 55-24-201; Tex. Rev. Civ. Stat. Ann. art. 4413(36) (Vernon); Utah Code Ann. § 13-20-1; Vt. Stat. Ann. tit. 9 § 4170; Va. Code § 59.1 — 207.7; Wash. Rev. Code § 19.118; W. Va. Code § 46A-6A-1; Wis. Stat. § 218.015; Wyo. Stat. Ann. § 40-17-101).

[259] U.C.C. § 2-608 (revocation of acceptance).

[260] 15 U.S.C. §§ 2301-2312 (1982).

Hospital Law Note

Update on Removal of Orthodontic Devices During Operations Desert Shield and Desert Storm

A legal assistance note in the January 1991 issue of *The Army Lawyer* described The Surgeon General's policy concerning orthodontic devices (braces).[261] This policy required that service members deploying to Southwest Asia have any orthodontic devices removed before deployment. Removal would reduce the chances of infection and injury while the service member operates in a geographical area where dental care may not be readily available. While few active service members have braces for cosmetic purposes, a number of Reserve component soldiers called to active duty were affected by the policy and had their braces removed. When the policy decision to remove the braces was issued, no funds were identified with which to replace the braces upon deactivation.

Following the dissemination of the order to remove orthodontic devices, the policy was modified. The Surgeon General determined that a Reserve component soldier will have orthodontic devices reinstalled at government expense if the soldier's dental records reflect the presence of the original devices. The policy requires that the government: (1) return the soldier to his or her original dental condition and (2) resolve any questions in the soldier's best interest.[262] This policy of replacing devices subsequently was extended to active duty soldiers as well.[263] Final decision-making authority for reinstallation rests with local dental treatment facility commanders. Major Pottorff.

Tax Note

DOD Designates Imminent Danger Areas

The Department of Defense (DOD) designated five countries that were not included in the Operation Desert Storm combat zone[264] as areas of imminent danger for special pay purposes.[265] The countries are Israel, Turkey, Jordan, Egypt, and Syria. This designation makes United States military personnel serving in these countries eligible for imminent danger or hostile fire pay of $110 per month.

This designation does not qualify soldiers serving in these areas for an immediate tax break, but it eventually may pave the way for future tax relief. Under Treasury regulations,[266] military personnel who qualify for imminent danger or hostile fire pay while providing services in an area not designated as a combat zone, but in direct support of military operation within a combat zone, may exclude military pay from their federal taxable income.[267]

DOD must, however, make a "direct support" determination before soldiers serving in these five countries will be entitled vicariously to the combat zone exclusion. Although DOD is expected to declare certain areas—such as Israel—as direct support locations, none of the five countries named in the imminent danger pay declaration have yet been determined to be direct support areas. Major Ingold.

Survivors Benefits

Recent Developments Affect DIC and SBP Programs

A recent modification to the Dependency Indemnity Compensation (DIC) program may be detrimental to surviving spouses who remarry. Formerly, entitlement to DIC could be reinstated if the second marriage ended in divorce, annulment, or death of the second husband. Similarly, the marriage of a deceased veteran's child would not preclude eligibility for benefits if the child's marriage was terminated. Now, however, in a change to the program made under the Omnibus Reconciliation Act of 1990,[268] remarried widows will not be entitled to DIC even if the second remarriage terminates upon these events. Moreover, children who marry will not be entitled to receive DIC even if their marriage ends.

The new change to the DIC program is prospective. Accordingly, widows and children who had DIC reinstated before November 1, 1990, will continue to receive DIC. The change does not, however, grandfather surviving spouses who married prior to November 1, 1990. The impact of this decision will be especially harsh on individuals who began divorce proceedings prior to 1 November 1990, but did not receive a final decree of divorce by that date.

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[261] *See* TJAGSA Practice Note, *Removal of Orthodontic Devices (Braces) from Soldiers Deploying on Operation Desert Shield*, The Army Lawyer, Jan. 1991, at 53.

[262] Message, HQ, Dep't of the Army, Office of The Surgeon General, 141310Z Dec 90, subject: Orthodontic Appliance Replacement for Desert Shield. Dental Treatment Facilities are to charge costs to AMS Code 847713.20, MDEP-VKWT.

[263] Message, HQ, Dep't of the Army, Office of The Surgeon General, 041300Z Jan 91, subject: Orthodontic Appliance Replacement for Desert Shield.

[264] Exec. Order 12744, *reprinted in*, 56 Fed. Reg. 2661 (1991). This combat zone declaration is discussed in TJAGSA Practice Note, *President Paves Way for Tax Benefits by Declaring Persian Gulf Area a Combat Zone*, The Army Lawyer, March 1991, at 54.

[265] *See* 37 U.S.C.A. § 310 (West Supp. 1990).

[266] Treas. Reg. § 1.112-1(j) (1990).

[267] I.R.C. § 112 (West Supp. 1990). Commissioned officers may exclude up to $500 pay per month from federal taxable income.

[268] Pub. L. No. 101-508, § 8004, 104 Stat. 1388 (1990).

The United States Supreme Court also entered a ruling that may be detrimental to surviving spouses when it recently denied certiorari in a case involving the Survivor Benefit Plan (SBP) social security offset.[269] The Court's decision lets stand a circuit court decision that upheld the social security offset. The circuit court ruled that the military may reduce SBP payments to a widow by the amount of social security benefits based on her deceased husband's military service. This offset would be authorized even though, under social security law, the widow actually was not entitled to survivor benefits because she was entitled to greater old age benefits.

In another move affecting survivor's benefits, Congress delayed the SBP open enrollment period from October 1, 1991, to April 1, 1992. This extension was enacted to give the Department of Defense more time to survey service members, define implementing measures, and recommend cost assessments. Major Ingold.

Veterans Law

Supreme Court Agrees to Hear Veterans Reemployment Rights Case

The Veterans Reemployment Rights Act (VRRA)[270] requires reservists and National Guard members to provide notice to an employer before they perform inactive duty for training or active duty for training.[271] This statutory provision operates as a notice requirement and does not give employers the right to refuse to grant an employee leave of absence. Nevertheless, several circuit courts have engrafted a "reasonableness" test upon this statutory requirement that gives employers the right to deny leaves of absence if the period of military service is unduly long or is otherwise unreasonable.[272] While this view has been gathering support, several circuit courts have refused steadfastly to read a reasonableness test into the VRRA.

In a move that may resolve this issue, the Supreme Court recently granted certiorari in *King v. St. Vincent's Hospital*.[273] In *King* a thirty-eight-year member of the Alabama National Guard serving as a security officer for St. Vincent's Hospital was offered the position as Command Sergeant Major of the Alabama National Guard. This full-time National Guard position was for a three-year period. King gave his employer notice of his intention to leave his civilian job to accept the position. Initially, King was told that he could have a leave of absence, but later the hospital denied his request on the basis that three years was an unreasonable length of time.

The *King* case is complicated by a VRRA provision which specifies that performing full-time duty in the National Guard should be treated the same way as performing inactive duty for training or active duty for training.[274] Therefore, despite the character and length of his military service, King was required to provide notice to his employer. In addition, the time served on full-time National Guard duty would not count toward the four-year active duty limit contained in the VRRA.

Despite the VRRA's not containing a provision that limits the length of duty, the district court held that three years is per se unreasonably long. The Eleventh Circuit upheld this position and noted that, even if three years was not per se unreasonable, King's request for leave of absence was nevertheless unreasonable under all of the circumstances. King appealed this decision to the Supreme Court, which agreed to hear the case.

The Eleventh Circuit is not alone in applying a reasonableness test to requests for leave of absence. Although most of these cases have focussed exclusively on the length of duty, the Third Circuit, in *Eidukonis v. Southeastern Pennsylvania Transportation Authority*,[275] held that duration is only one of several factors that may be considered by an employer in denying leave.

Several circuit courts also have suggested that requests for leave of absence under section 2024(d) of the VRRA are subject to an adequate notice requirement.[276] Under this view, to receive reemployment rights under the VRRA, an employee must provide the employer with more than casual reference concerning upcoming military obligations.

Courts are not unanimous in the view that requests for leave are subject to an adequate notice or reasonableness test. Several courts, including the Fourth Circuit in *Kolkhorst v. Tilghman*,[277] have held that VRRA section 2024(d) does not permit courts to consider the reason-

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[269] Miller v. McGovern, 907 F.2d 957 (10th Cir. 1990), *cert. denied*, Miller v. Rice, 111 S. Ct. 952 (1991).

[270] *See* 38 U.S.C.A. § 2024(d) (West Supp. 1991).

[271] *Id.*

[272] *See, e.g.*, Ellermets v. Department of Army, 916 F.2d 702 (Fed. Cir. 1990); Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981). Most of the litigation involving the reasonableness test has focused on the duration of the leave requested. The length of the leave, however, may be only one of several factors courts should consider in determining reasonableness.

[273] 901 F.2d 1068 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 950 (1991).

[274] The Guard member in *King* was ordered to full-time duty under 32 U.S.C. § 502(f).

[275] 873 F.2d 688 (3d Cir. 1989). The Federal Circuit also has applied the reasonableness test in view of several other factors, such as the timing of the request. *See Ellermets*, 916 F.2d at 702.

[276] Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988); Burkart v. Post-Browning, Inc., 859 F.2d 1245 (6th Cir. 1988).

[277] 897 F.2d 1282 (1990), *petition for cert. pending*, No. 89-1949.

ableness of a request for a leave of absence.[278] In *Kolkhorst* the court concluded that an employer's policy of establishing an upper limit on the number of employees serving in the Reserves violated section 2024 of the VRRA.[279] The court noted that "[t]he reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers."[280]

Until the Supreme Court decides *King*, reservists and National Guard members should provide employers with as much advance notice concerning impending military obligations as possible. Reservists and National Guard members should make an explicit written request for military leave and specify clearly the time they will be away from the job to perform military duties. Major Ingold.

Changes Made To Veterans Reemployment Rights Law

In response to numerous questions about the scope of the Veterans Reemployment Rights Act in two critical areas, the Senate recently included amending legislation in the Soldiers' and Sailors' Civil Relief Act Amendments of 1991.[281] The legislation clarifies returning veterans' rights to health care and resolves a gap in the prior VRRA for individuals who are called to active duty for over ninety days.

One of the important protections accorded by the VRRA is the right to reinstated health care benefits upon a veteran's return to civilian employment.[282] Prior law did not, however, specify eligibility to reinstated health care when the veteran had a preexisting condition that arose after he or she left civilian employment. The amendment to the VRRA prohibits employers from imposing waiting periods or restrictions on an employee's health benefits for health or physical conditions that existed prior to or during the performance of active duty. An employer may decline coverage only if the Secretary of Defense determines that the condition was service connected.

The former version of the VRRA provided that reservists and members of the National Guard called to active duty for up to ninety days pursuant to presidential call-up authorization were entitled to the same rights under the VRRA as individuals ordered to initial duty for training.[283] The VRRA, however, did not address the rights of reservists who were called up for over ninety days. The new amendment specifies that reservists called to active duty for up to 180 days enjoy the same rights as individuals called to initial training for active duty. This change ensures that the VRRA fully coincides with presidential call-up authority.

Attorneys advising veterans of their reemployment rights and obligations should avoid making broad generalizations about the VRRA. The act contains a complex scheme that bases rights and obligations on the status of the service member, the authorization for entering active duty, and the length of duty. These variables will dictate, for example, whether a reservist must provide notice to an employer prior to entering active duty, the length of time a returning veteran has to report to, or apply for, a former position, the length of time a returning service member is protected against discharge without cause, and whether the time served on active duty applies toward the general four-year service limitation imposed before rights under the VRRA are forfeited.[284]

The following chart indicates how status and active duty authorization affect these areas. The chart provides the basic VRRA code section pertaining to each form of military service and lists the time for reapplying as well as the length of protection from discharge without cause, and indicates whether the time served counts toward the general four-year total active duty service limitation.

Most reservists and National Guard members serving on active duty in support of Operation Desert Shield or Operation Desert Storm will fall within the category of being called to active duty under presidential call-up authority or by presidential order. Accordingly, these reservists will have ninety days to apply for reemployment and will have one-year protection from discharge without cause. Reservists involved in Operation Shield who left active duty prior to January 18, 1991, however, fall within a different section of the statute that requires application within thirty-one days and that limits the pro-

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[278] *See* Cronin v. Police Dep't, 675 F. Supp. 847 (S.D.N.Y. 1987).

[279] The court also concluded that the employer's action violated the antidiscrimination provision of 38 U.S.C. § 2021(b)(3).

[280] *Kolkhorst*, 897 F.2d at 1286.

[281] S. 330, 102d Cong., 1st Sess. § 5, 137 Cong. Rec. S2139-01 (1991).

[282] *See* 38 U.S.C.A. § 2021(b)(1) (West Supp. 1990).

[283] *Id.* § 2024(g).

[284] The general service limitation under the VRRA is that the total period of active duty may not exceed four years plus any additional period in which the veteran was unable to obtain orders granting relief from active duty. *See id.* § 2024(b)(1). The statute provides, however, that certain service obligations, such as initial periods of active duty for training, inactive duty for training, active duty for training, and full-time duty by a member of the National Guard, will not count toward the service limitation cap.

tection against discharge without cause to only six months.[285] In both cases, the time spent on active duty should not count toward the total four-year limit.

Legislation modifying the present structure of the VRRA has been presented to Congress. The proposed legislation completely alters the present scheme of affording different rights to returning service members depending on military status and authorization for performing military duties.[286] This much-needed reform will offer different levels of protection based solely on the length of time served on active duty.

Service members leaving active duty should apply for reemployment as soon as possible. Although no special application form is specified under the VRRA, returning service members should apply in writing. The application should explain that the service member is a former employee who has left active duty and who wishes to be reinstated under the provisions of the VRRA. Following these steps will lower the risk that a soldier has misinterpreted his or her rights under the VRRA and will serve as valuable evidence that statutory obligations have been satisfied in the event that a dispute with the employer arises.

A service member should contact the Veterans' Employment and Training Service (VETS), Department of Labor, if a private, state government, or local government employer denies him or her reemployment rights.[287] Veterans having trouble obtaining reemployment rights from the federal government should seek assistance from the Office of Personnel Management. All returning service members can obtain information and assistance concerning the VRRA by calling the nationwide toll-free number established by the National Committee for Employer Support of the Guard and Reserve.[288] Major Ingold.

COMPARISON OF VRRA ELIGIBILITY REQUIREMENTS AND BENEFITS

STATUS	Code Section	Reapply/ Report	Notice Required	Protection From Discharge	Count to 4 years
Active Duty Enlistees	2024(a)	90 Days	No	1 Year	Yes
Initial Active Duty For Training	2024(c)	31 Days	No	6 Months	No
Active Duty For Training	2024(d)	Next Scheduled Work Period	Yes	None*	No
Inactive Duty For Training	2024(d)	Next Scheduled Work Period	Yes	None*	No
Full Time Duty in National Guard	2024(f)	Next Scheduled Work Period	Yes	None*	No
Called to Active Duty Up to 180 Days	2024(g)	31 Days	No	6 Months	No
Active Duty Under Presidential Order	2024(b)(2)	90 Days	No	1 Year	Yes**

*Employer may not discharge due to military obligations or affiliation § 2021(b)3.

** The service limitation will be extended if either voluntarily or involuntarily extended during a period when the President is authorized to order Reserves to active duty.

[285] *Id.* § 2024(g).

[286] The proposed Bill is entitled the Uniformed Services Employment Rights Act of 1991.

[287] The VETS national office telephone number is 202-523-8611.

[288] The nationwide toll-free number for the committee is 1-800-336-4590. The autovon number is 226-1400.

Note From the Field

California State Bar Board Initiates Statewide Effort to Assist Military Personnel on Active Duty During Operation Desert Storm

The Board of Governors of the State Bar of California has voted to provide legal assistance and financial relief for California military personnel serving in Operation Desert Storm, as well as their families and dependents. In addition, the board, at its 26 January 1991 meeting, waived 1991 state bar membership fees for lawyers who, as military reservists, are called up for full-time active duty and serve for at least thirty days. The board members unanimously agreed that the measures were necessary because of the unexpected disruption that the Persian Gulf military operation had on reservists' law practices and families.

In addition, the board directed state bar staff to provide local bar associations throughout California with a resource manual for volunteer lawyers. The manual will identify the types of problems faced by military families and dependents. It also will provide information about resources—both civilian and military—that are available to help solve the problems or lend assistance. The manual was expected to be made available by 1 February 1991. The state bar's Office of Communications also will distribute to military dependents and families, for the duration of the military operations in the Middle East, free copies of the bar's consumer education pamphlets and will forms. Colonel Brawley, SJA, Sixth U.S. Army.

Contract Law Notes

Bid Guarantee Update

General Accounting Office (GAO) opinions are rife with bid protests that focus on the contracting officer's treatment of bids when the bid guarantee accompanying an offer is deemed to be defective. In the past few months, the GAO has decided several noteworthy cases that delineate appropriate responses to specific bid guarantee questions. The GAO's decisions in these cases are bound to confront contracting officers and attorney advisors in the future.

Use of Facsimile Bid Bond Renders Bid Nonresponsive

A photocopied bid bond is generally unacceptable because it raises questions concerning its enforceability. Therefore, a contracting officer should find a bid nonresponsive when accompanied by such a bond.[289] In *Bird Construction*[290] the protestor submitted a facsimile copy of the required bid bond with its bid. Accordingly, the second-low bidder protested to the contracting officer, arguing that the bid submitted by Bird Construction (Bird) was nonresponsive. The contracting officer reviewed the bond and rejected the bid as nonresponsive because the facsimile did not include the original signature of the surety. Bird argued that although the surety's signature was not an original, the bond still would be enforceable because the bidder's signature was original and because the bond included the surety's facsimile phone number, which apparently linked the document to the surety. The protestor also asserted that providing bonds by telefacsimile, and then following them up with an original in overnight mail, was a growing practice in the surety industry.

The GAO did not accept Bird's arguments and denied its protest. The GAO's rationale focused on two issues. First, the liability of a surety is of paramount concern when questions of bond enforceability arise. The fact that the bond included the bidder's "wet" signature was irrelevant and did not dispel the possibility that someone might have altered the bond without the surety's consent. Second, although the bidder presented the original bond two days after award, the contracting officer properly refused to consider it because a contracting officer must determine the liability of a surety from information available when bids are opened.

Misunderstandings of this nature are avoidable. First, although nothing indicates that facsimile bids were authorized and submitted in this case, contracting officers should consider whether permitting this method of bid submittal is appropriate when a solicitation calls for bid guarantees—especially because facsimile bid guarantees clearly will not be acceptable. Second, assuming that surety companies are increasingly resorting to facsimile machines to furnish bid bonds to their customers—as asserted by the protestor in *Bird Construction*—the contracting officer easily may forewarn offerors that these bonds are unacceptable. A provision that makes this prohibition clear is a necessity in every solicitation requiring the submission of bid guarantees.

Bond That Does Not Address Element of Surety Liability is Defective

Offerors are not required to use the government bid bond form—Standard Form 24 (SF 24). Instead, they may submit commercial bonds with their bids as long as these forms do not deviate substantially from the terms of the government bonds.[291] In *Eagle Asphalt & Oil, Inc.*[292] the protestor submitted bid bonds for two road construction contracts. Each solicitation instructed offerors to provide

[289] *See* Darla Envtl., Inc., Comp. Gen. Dec. B-234560 (12 May 1989), 89-1 CPD ¶ 454.

[290] Comp. Gen. Decs. B-240002, B-240002.2 (19 Sept. 1990), 90-2 CPD ¶ 234.

[291] Allgood Elec. Co., Comp. Gen. Dec. B-235171 (18 July 1989), 89-2 CPD ¶ 58.

[292] Comp. Gen. Decs. B-240340, B-240344 (14 Nov. 1990), 90-2 CPD ¶ 395.

a bid bond. Successful offerors then would be required to execute the contract and furnish performance and payment bonds.[293]

Although the solicitation included all necessary blank standard forms, Eagle Asphalt and Oil, Inc. (Eagle) opted to use the bonds of a surety insurance company. In pertinent part, these commercial forms provided that the surety's obligation would be satisfied if the principal, Eagle, executed the contract and submitted a "bond, with surety acceptable to the [government] for the faithful *performance* of [the] contract."[294] The bonds were silent, however, regarding the liability of the surety if the offeror did not execute *payment* bonds.

The contracting officer found Eagle's bonds defective because they did not afford the protection of an SF 24, under which a surety is obligated to the government if the offeror does not execute "the bonds required by the terms of the bid." Eagle protested that the solicitation allowed contracting officers the discretion to reject bids if bid guarantees were not in the proper form. Accordingly, Eagle asserted that because it had submitted an otherwise timely and properly executed bond, the contracting officer acted unreasonably.

The GAO, however, found the contracting officer's action to be reasonable. It noted that the solicitation required offerors to furnish performance *and* payment bonds, but the language of Eagle's commercially prepared bond raised questions over whether or not the surety would be liable if Eagle failed to execute a payment bond. Moreover, the GAO held that although the solicitation provided that a contracting officer "may" reject offers if bid guarantees were not in the proper form, the term "may" in this context "is just as compelling and material as if more positive language were employed."[295]

Contracting Officer Properly Rejected Bid that Did Not Include Bid Guarantee Required by DFARS

Recently, two inquiries from the field have addressed the Defense Federal Acquisition Regulation Supplement (DFARS) clause that advises offerors that only separate bid bonds, United States bonds, Treasury notes, or other public debt obligations of the United States are acceptable bid guarantees for construction solicitations.[296] The question asked in both cases was whether rejecting as nonresponsive bids that are accompanied by guarantees that do not comply with this clause, but that include guarantees which are acceptable under the Federal Acquisition Regulation (FAR), is proper.[297] In *Concord Analysis, Inc.*[298] the GAO addressed this specific issue for the first time.

This case involved a solicitation for the removal of asbestos and it incorporated the DFARS bid bond clause.[299] As its bid guarantee, Concord Analysis, Inc. (Concord) chose to furnish four checks, including uncertified company and personal checks in various amounts, to meet the penal sum of $280,000. According to Concord, it had intended to submit certified checks, but did not based on advice from a contract specialist who found nothing in the FAR that either prohibited or permitted the use of personal or company checks. Initially, the contracting officer considered Concord's bid for award and even deposited the bid guarantee in a non-interest-bearing account. Upon further review, however, the contracting officer rejected the bid as nonresponsive because the bid guarantee did not conform to the requirements of the DFARS.

Concord protested, arguing in part that the FAR does not prohibit the use of a company check as a bid guarantee. The government argued that because this was a solicitation for construction services, and because the DFARS clause is unambiguously restrictive, the DFARS—not the FAR—was controlling.[300] The GAO agreed with the government, and held that despite the comment attributable to the contract specialist about what the FAR provided—or did not provide—concerning the use of uncertified checks, the bidder was bound by the DFARS clause which does not permit the use of checks of any kind.

In addition to conclusively answering questions raised about this DFARS clause, *Concord Analysis* highlights a couple of points for practitioners and contracting officers

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[293] The Miller Act requires that awardees under federal construction contracts in excess of $25,000 execute performance and payment bonds. The payment bond protects laborers and materialmen in the event a contractor fails to pay them. The performance bond is for the benefit of the government and secures fulfillment of the contractor's obligations. 40 U.S.C. §§ 270a-270f (1988); Federal Acquisition Reg. 28.001 [hereinafter FAR].

[294] *See Eagle Asphalt and Oil*, 90-2 CPD ¶ 395, at 4 (emphasis added).

[295] *Id.*

[296] *See* Defense Fed. Acquisition Reg. Supp. 252.228-7007(a) [hereinafter DFARS]. One attorney indicated that an offeror protested to the GAO after the contracting officer rejected its bid as nonresponsive for failure to comply with the DFARS bond requirement. Sometime after the GAO decided *Concord Analysis*, this contractor withdrew its protest.

[297] Under the FAR, United States bonds, as well as certified or cashier's checks, bank drafts, Postal money orders, and currency, are acceptable substitutes for surety bonds. FAR 28.204-1; 28.204-2.

[298] Comp. Gen. Decs. B-239730.3, B-241009 (4 Dec. 1990), 90-2 CPD ¶ 452.

[299] Interestingly, this acquisition was a set-aside for exclusive small, disadvantaged business competition and all eight bids submitted ultimately were rejected because the bidders did not meet the bonding requirement.

[300] The government also argued that an earlier GAO case upheld the rejection of a bid as nonresponsive when it included a bid guarantee in the form of a company check. *See Concord Analysis*, 90-2 CPD ¶ 452 at 3 (citing Forbes Mfg., Inc., Comp. Gen. Dec. B-237806 (12 Mar. 1990), 90-1 CPD ¶ 267).

to consider. First, contracting personnel must remember that even an in-depth review of the FAR may not reveal answers to questions they have about the procedural or substantive aspects of an acquisition. In this case the specialist, and perhaps even the contracting officer, apparently were not initially aware that the DFARS strictly limited bid guarantee types. *Concord Analysis*, therefore, reinforces the idea that practitioners should consult each applicable FAR supplement before being satisfied that a particular course of action is appropriate. Secondly, contracting officers may wish to consider including this particular clause in full text to avoid any misconceptions about which types of bid guarantees are acceptable—particularly because responsiveness is at issue in this type of case.

Pledge of Assets Is Matter of Responsibility—Not Responsiveness

In *Burtch Construction*[301] the protestor submitted two bids for road construction on an Indian reservation in Montana. The solicitations required bid guarantees and Burtch Construction (Burtch) chose to use individual sureties[302] to back his bonds. Burtch's sureties, however, used an outdated version of the Affidavit of Individual Surety, Standard Form 28 (SF 28), that did not advise Burtch that individual sureties must submit a pledge of assets with their affidavits.[303] Accordingly, the sureties did not furnish pledges and the contracting officer rejected the bids as nonresponsive because the solicitation required that pledges accompany the bid bonds.

The GAO sustained Burtch's protest, restating the rule that the responsiveness of a bid guarantee hinges on whether the guarantee will be enforceable if the offeror defaults on its obligation to execute the contract and provide further bonding. In Burtch's case, even though the sureties did not pledge assets, they still were bound to the terms of the bid bonds that they signed; the government's interests, therefore, were protected sufficiently. In short, failure to submit a pledge of assets did not diminish the liability of the individual sureties. The GAO opined that the pledge of assets is intended to assist the contracting officer in determining whether the individual sureties are financially capable of backing the bonds. The GAO further concluded that although the FAR requires that a pledge of assets accompany individual surety bonds, this is a matter of responsibility—not responsiveness. Major Helm.

Clarification to *The Year in Review* Item on Leases of Vessels, Aircraft, and Vehicles

1990 Contract Law Developments—The Year in Review[304] correctly states that the recurring provision prohibiting leases in excess of eighteen months[305] was dropped in the 1991 DOD Appropriations Act.[306] This provision, however, was dropped because the previous year's Defense Appropriations Act[307] made the provision permanent, though not codified.[308] Major Jones.

Academic Department Note

Military Qualification Standards System

Every Judge Advocate General's Corps (JAGC) officer is familiar with The Judge Advocate General's School (TJAGSA) deskbooks and other TJAGSA-produced Continuing Legal Education (CLE) publications, but how many know about Military Qualification Standards (MQS)? This article explains the MQS system and challenges each JAGC officer to make MQS as familiar as CLE.

The MQS system establishes the responsibilities and standards for common and branch-specific training, education, and professional development of Army officers. It also identifies the critical battle-focused tasks, skills, and knowledge that officers must master at each stage of their careers. For the foreseeable future, the MQS system for JAGC officers will identify only training requirements common to all officers.

The MQS concept is one of progressive "leader development." It begins before commissioning and continues throughout an officer's career. The system identifies "passage points" that are associated with promotion and schooling. Proficiency in various tasks is to be verified at officer basic and advanced courses and upon

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[301] Comp. Gen. Decs. B-240695, B-240696 (23 Nov. 1990), 90-2 CPD ¶ 423.

[302] An individual surety is a person, rather than a business entity, who is liable for the entire penal sum of a bond. FAR 28.001, 28.203(b).

[303] A pledge of assets must be in the form of evidence of an escrow account containing cash, cash equivalents, commercial securities, or government securities. A pledge of assets also may be evidence of a recorded lien on real property in favor of the government. FAR 28.203-1.

[304] The Army Lawyer, Feb. 1991, at 3.

[305] *Id.* at 8; *see* 10 U.S.C. § 2401 (1988).

[306] *See* Pub. L. No. 101-511 (1990).

[307] *See* Department of Defense Appropriations Act, 1990, Pub. L. No. 101-65, 103 Stat. 1147 (1989).

[308] *See id.* § 9081.

enrollment in the Command and General Staff College. The requirements apply to both active and Reserve component officers and to both resident and nonresident students.

MQS has two components: (1) a military task and knowledge component; and (2) a professional military education component. The military task and knowledge component is broken down further into tasks, such as "engage targets with an M16A1 rifle," and professional knowledge, such as "customs and traditions of the service." The professional military education component consists primarily of a reading program.

The MQS system has three levels: MQS I, MQS II, and MQS III. MQS I is the precommissioning level. The manual of common tasks for MQS I is Soldier Training Publication (STP) No. 21-I-MQS, dated 31 May 1990. TJAGSA now issues it to every Basic Course student. MQS II applies to company grade officers. The manual of common tasks for MQS II is STP 21-II-MQS, dated 31 January 1991. Every lieutenant and captain should receive a personal copy through the pinpoint distribution system. The MQS II tasks are broken down further into lieutenants' tasks and captains' tasks. When published, MQS III will apply to field grade officers. It will focus on service in positions of greater responsibility, higher level command and joint staffs, and senior service college.

The MQS tasks are mastered and the necessary knowledge and attitudes acquired in three ways: institutional training, operational assignments, and self-development. For new JAGC officers—except for ROTC graduates and former basic branch officers—selected precommissioning tasks and professional knowledge requirements under MQS I first are encountered in the Basic Course. The Basic Course includes training in some MQS II tasks, but, as is the case with MQS I, the course simply does not allow time to cover all of them. Actually, the system does not envision covering all of them in any branch basic course.

In terms of operational assignments, most initial judge advocate assignments do not provide an opportunity to practice many of the common tasks. For example, new judge advocates are not required to "develop a cohesive platoon sized organization." Becoming familiar with the MQS II Manual of Common Tasks for Lieutenants and Captains and providing as many opportunities as possible for their officers to engage in activities that will help them become proficient is up to staff judge advocates.

To the extent an officer's assignments are not conducive to practicing certain skills, the officer must spend time with the common tasks manual and become as familiar as possible with the information it contains. Clearly, mastering the tasks is the primary responsibility of the individual officer.

TJAGSA is studying MQS I and II to determine how best to prioritize training objectives. The School will endeavor to determine which tasks are most important to judge advocates and where they can be learned most effectively. Apparently, the Combined Arms and Services Staff School will play a very important role in the development of company grade officers. Nevertheless, staff judge advocates and other senior JAGC officers must ensure that their officers participate in available unit training in MQS common tasks. Precisely how proficiency will be verified is not yet clear, but now is not too soon for judge advocates to begin preparing. Major Brayshaw.

Claims Report

United States Army Claims Service

Claims Policy Note

1991 Table of Adjusted Dollar Value

This Claims Policy Note replaces Department of the Army Pamphlet 27-162, table 2-1. The 1989 multipliers and notes from that table are changed, and 1990 multipliers are added. In accordance with paragraph 1-9f of Army Regulation 27-20, this guidance is binding on all Army claims personnel.

Year Purchased	Multiplier 1990 Losses	Multiplier 1989 Losses	Multiplier 1988 Losses	Multiplier 1987 Losses
1990	—	—	—	—
1989	1.05	—	—	—
1988	1.10	1.05	—	—
1987	1.15	1.09	1.04	—
1986	1.19	1.13	1.08	1.04
1985	1.21	1.15	1.10	1.06
1984	1.26	1.19	1.14	1.09
1983	1.31	1.24	1.19	1.14
1982	1.35	1.28	1.23	1.18
1981	1.44	1.36	1.30	1.25
1980	1.59	1.50	1.44	1.38

Year Purchased	Multiplier 1990 Losses	Multiplier 1989 Losses	Multiplier 1988 Losses	Multiplier 1987 Losses
1979	1.80	1.71	1.63	1.56
1978	2.00	1.90	1.81	1.74
1977	2.16	2.05	1.95	1.87
1976	2.30	2.18	2.08	2.00
1975	2.43	2.30	2.20	2.11
1974	2.65	2.52	2.40	2.30
1973	2.94	2.79	2.66	2.56
1972	3.13	2.97	2.83	2.72
1971	3.23	3.06	2.92	2.80
1970	3.37	3.20	3.05	2.93
1969	3.56	3.38	3.22	3.10
1968	3.76	3.56	3.40	3.26
1967	3.91	3.71	3.54	3.40
1966	4.03	3.83	3.65	3.51
1965	4.15	3.94	3.76	3.61
1964	4.22	4.00	3.82	3.66
1963	4.27	4.05	3.87	3.71
1962	4.33	4.11	3.92	3.76
1961	4.37	4.15	3.96	3.80

Notes:

1. Use this table *only* when *no* better means of determining an item's value exists. Do *not* use this table to value ordinary household items that are listed in catalogs, and do not use it when the claimant cannot substantiate a purchase price.

2. To determine an item's adjusted dollar value (ADV), move down the column for the calendar year the loss occurred until you find the "multiplier" for the year the item was purchased. Multiply the item's purchase price by this "multiplier" to find the item's "adjusted cost." *Then depreciate this "adjusted cost" using the Allowance List-Depreciation Guide (ALDG).* For example, for a comforter purchased for $250 in 1980 and destroyed in 1988, multiply $250 times 1.44, the "year purchased" multiplier for 1980 in the "1988 losses" column. This yields an "adjusted cost" of $360. Then depreciate the comforter as expensive linen (item 88, ALDG) for eight years at five percent-per-year, which results in an ADV of $216 for the item.

3. For losses occurring in 1991, use the "1990" column.

Management Notes

Disposing of Legal-Sized Personnel Claims Forms

The Department of Defense Claims System has converted itself from using legal-sized documents to using letter-sized documents. The December 1988 edition of DD Form 1842 and the February 1989 edition of DD Form 1844 were reduced to 8½ × 11-inch size as part of this process. Change 2 to Department of Army Regulation 27-20, Legal Services: Claims, para. 15-5*a* (28 Feb. 1990), directed claims offices to use 9¼ × 11¼-inch manila file folders for all claims files. By now, claims offices should be using the current versions of these forms and the short folders for personnel claims. Offices always were required to use short file folders for torts and affirmative claims.

To complete this conversion to short forms and files, claims offices are directed to cease handing out prior versions of DD Forms 1842 and 1844, and to dispose of existing stocks of these forms—preferably by recycling the paper. Offices that have not ordered sufficient quantities of short file folders should order them immediately. The use of letter size forms and folders often has been an issue during Inspector General visits to claims offices. Mr. Frezza.

Certificates of Achievement

All staff judge advocates are reminded that United States Army Claims Service (USARCS) Certificates of Achievement may be awarded to selected personnel serving in judge advocate claims offices worldwide. The certificate provides special recognition to civilian and enlisted personnel who have made significant contributions to the success of the Army Claims Program within their respective commands.

To be awarded the certificate, an individual must:

(1) be an enlisted or civilian employee currently serving in a judge advocate claims office;

(2) have worked in claims for a minimum of five years (this period may be figured on a cumulative basis and may include different assignments or claims positions);

(3) be nominated by the staff or command judge advocate, detailing the contributions of the individual that makes him or her worthy of this recognition; and

(4) be the only person in an office nominated for a certificate in any calendar year (this requirement may be waived in exceptional cases at the request of the nominating official).

Address nominations to the Commander, USARCS, who is the approving official for the award of the Certificate of Achievement. Upon approval, the signed certificate will be mailed to the nominating official for presentation at an appropriate ceremony.

The names of the recipients are published in the USARCS report, which is distributed each year at the Judge Advocate General Continuing Legal Education Training Program. Twenty-eight claims personnel have been awarded the United States Army Claims Service Certificate of Achievement. Lieutenant Colonel Thomson.

Environmental Law Notes

OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division

The following notes advise attorneys of current developments in the area of environmental law and of changes in the Army's environmental policies. OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division encourage articles and notes from the field for this portion of *The Army Lawyer*. Authors should submit articles to The Judge Advocate General's School, ATTN: JAGS-ADA, Charlottesville, VA 22903-1781.

Burning Used Oil for Energy Recovery

Introduction

In today's mechanized Army, disposal of used oil is an important issue. With disposal costs rising, burning used oil for heating purposes makes considerable economic sense. Burning used oil also makes environmental sense because it usually is environmentally safer than other methods of disposal. Used oil, however, may be contaminated with hazardous substances. The environmental consequences of burning used oil can be determined accurately only when all of these substances are identified.

The most common hazardous substances found in used oil are halogens. Halogens are in many solvents used to clean oil and grease from parts and materials. When halogenated solvents are present in used oil that is burned, the resulting air emissions can cause immediate adverse health effects including headaches, eye irritation, and dermatitis. Long-term adverse health effects may include liver damage.

The Mixture and Burning Rules

According to the Environmental Protection Agency (EPA), mixing a "hazardous waste"[1] and a "solid waste"[2] results in a "regulated hazardous waste."[3] Accordingly, the resulting so-called "mixed wastes" must be disposed of pursuant to the stringent and expensive requirements associated with hazardous wastes disposal.[4]

As an alternative, used oil containing hazardous substances may be "blended" with other used oil and burned for energy recovery. Burning this blended product, however, must pose no greater health hazard than burning used "virgin" fuel oil.[5] This "mixture" rule recognizes that the quantity of used oil produced in this country makes treating all non-virgin used oil as a hazardous waste difficult. It also ensures that used oil with the potential to create an environmental or health hazard is not burned, but instead recycled or disposed of through other, safer means.[6]

The rules on burning used oil for energy recovery in boilers or industrial furnaces are found in the Code of Federal Regulations at title 40, section 266.40. Following is an abbreviated version of those rules.

Used oil containing levels of halogenated solvents of up to 1000 parts per million (ppm) may be blended for the purpose of burning for energy recovery if:

(1) The level of halogenated solvents in the used oil does not exceed 1000 ppm in the batches of used oil being blended;

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[1] 40 C.F.R. § 260.3 (1990). In general, a waste is hazardous if it is listed by the EPA in 40 C.F.R. part 261, subpart D, or if it has the hazardous characteristics discussed in 40 C.F.R. part 261, Subpart c.

[2] 40 C.F.R. § 260.2 (1990) (solid wastes include solid, semi-solid, liquid, and containerized gaseous waste).

[3] *Id.* § 261.3.

[4] *See id.* part 264.

[5] *See* 50 Fed. Reg. 49164 (1985) (Hazardous Waste Management System; Used Oil; Final Rule and Proposed Rules).

[6] *Id.*

(2) The solvent contamination in the used oil is the result of the normal operation which generated the used oil; and

(3) The facility burning the used oil has met the EPA notification requirements of 40 C.F.R. section 266.40(b) and obtained any required federal, state or local permits.

Records of analysis showing that the batches of used oil being blended to burn for energy recovery are in compliance with the requirements of 40 C.F.R. section 266.40 must be maintained for three years.[7]

Used oil containing levels of halogenated solvents in excess of 1000 ppm, or used oil containing between 100 and 1000 ppm halogenated solvents because of other than normal operations, must be managed and disposed of as a hazardous waste.[8] Excessively contaminated used oil also can be burned for energy recovery under the more stringent requirements of 40 C.F.R. part 266, subpart H.[9] In both cases, however, the installation must seek a permit from the appropriate state regulatory agency or from the regional office of the EPA.

Terminology

Using proper terminology when working in the area of burning used oil is extremely important. Combining different batches of used oil for the purpose of energy recovery is called "blending." "Mixing," on the other hand, combines used oil and hazardous wastes, which results in a hazardous waste that can be burned only under strict conditions. Do not confuse these two terms.

Recently, repeated references to "mixing" used oil at a major Army installation attracted the interest of regulators and the Army Audit Agency. The subsequent report of the Army Audit Agency caused the Director of the Army Staff to order a formal investigation.[10] The investigation ultimately determined that the installation actually was blending in accordance with the pertinent regulations. Hundreds of man-hours, however, were wasted in sorting out the problem and exonerating the personnel involved.

This type of confusion is a natural result of the existing regulatory maze. The Environmental Law Division, however, is available to assist the Army legal community in this complex area.

Useful Publications: *Environmental Alert*

The Toxic and Hazardous Materials Agency publishes an excellent update service on environmental laws, regulations, and related issues called *Environmental Alert.* This publication is distributed periodically, providing advice and information concerning important changes in environmental regulations, upcoming deadlines, and other useful information. Presently, *Environmental Alert* is distributed only within the facility engineer community. The Environmental Law Division, however, currently is in the process of arranging to have future issues distributed to judge advocates. In the interim, environmental attorneys should check with their facility engineer for copies of the *Environmental Alert.*

[7] 40 C.F.R. § 266.42 (1990).

[8] *See id.* parts 265, 267.

[9] 56 Fed. Reg. 7134 (1991) (Burning of Hazardous Waste in Boilers and Industrial Furnaces).

[10] *See* Army Reg. 15-6, Boards, Commissions, and Committees: Procedure for Investigating Officers and Boards of Officers (11 May 1988).

Regimental News From the Desk of the Sergeant Major

Sergeant Major Carlo Roquemore

71D/71E Basic Noncommissioned Officer Course

The Basic Noncommissioned Officer Course (BNCOC) for 71D and 71E has seen a great deal of change over the past year. The NCO Academy has received a lot of questions from soldiers about the standards and expectations of the school. This article explains what potential students can expect once they arrive at BNCOC and what they can do to better prepare themselves for the course.

The NCO Academy is student-led and instructor-assisted. This arrangement gives the students an opportunity both to lead and to learn. The first three weeks are devoted entirely to common core subjects. The core subjects are developed by the Sergeants Major Academy and are taught using the small group method of instruction. This method of instruction enables the students to draw upon their own experiences and to share the methods that are being used in their respective units. Some of the more important core subjects are marksmanship training; physical training; land navigation; property accountability; and leadership doctrine.

Students need to arrive with all of their basic issue of clothing. Missing items will have to be purchased. Students will be billeted in the NCO Academy billets. On a soldier's arrival at the academy, he or she will be inprocessed, weighed, given a record Army Physical Fitness Test (APFT), and administered a military occupational specialty diagnostic test. Any student failing to

meet the Army height and weight standards will be disenrolled and returned to his or her unit. Accordingly, the chief legal NCO of the disenrolled student's installation will be notified of the basis for the disenrollment. Students not only should be aware that they can be disenrolled at the beginning of a course, but also that current Training and Doctrine Command policy does not permit BNCOC and Advanced Noncommissioned Officers Course (ANCOC) students to graduate if they fail the APFT.

In addition to physically preparing themselves prior to arrival at the academy, students should prepare themselves by studying map reading, compass skills, and weapons qualification. During the course, students will run their own weapons range and will qualify on the M16 rifle. Students should be aware that Fort Benjamin Harrison uses the alternate firing range instead of the pop-up firing range. *See* Dep't of Army, Field Manual 23-9, M16A1 Rifle and Rifle Marksmanship (17 June 1974) (C1, 27 Aug. 1975). Additionally, students will develop their own physical training program using the guidance provided from the Master Fitness School.

After completing the common core, students will begin the track phase of their training, which includes legal research, computer training, administrative separations, article 15s, article 32 investigations, court-martial convening orders, actions, promulgating orders, adjudicating personal property claims, and article 139 claims.

The track phase is conducted using a lecture-practical exercise-test method. During the past year, the computer training was expanded from familiarization training on ENABLE software, to more in-depth training that includes spreadsheets, databases, and the LAAWS III applications. In the near future, instruction on processing affirmative claims, reviewing records of trial, and conducting legal assistance mobilization procedures will be added.

To graduate from the course, students must attain a final course average of seventy percent. The Commandant's List is limited to the upper twenty percent of students passing all tests the first time. All students must qualify with the M16 rifle and pass the APFT. The top student can expect to receive a plaque and certificate from the Association of the United States Army.

A technical track for 71D/71E ANCOC is being developed and is expected to be ready for fielding in fiscal year 1992. This technical track will fill a long-standing training void. Some of the subjects to be taught are processing actions under Reserve component jurisdiction; processing and investigating tort claims; reviewing affirmative claims; supervising legal assistance mobilization procedures; reviewing court-martial packets; operations in federal magistrate courts; legal training management; legal office management and supervision; and the duties, responsibilities, and authority of lawyer's assistants.

Many important issues are developing with respect to the Legal Specialist Course. The advanced individual training (AIT) and skills qualification test (SQT) departments will be moving to Fort Jackson, South Carolina. This move should take place over the next several months, ending sometime in November 1991. The school is committed to providing the Army with high quality legal specialists. To achieve this objective, the school is adding instruction on suspension of favorable actions; processing claims for damage, injury, or death on special form 95 (SF 95); processing soldiers for confinement; filing documents; and establishing files. The school also is maintaining a standard on typing speed at thirty-five words-per-minute. In addition, it has added additional study halls outside of the program of instruction to help students meet the course requirements.

Clearly, the school has come a long way and it will continue to provide the best training possible for our legal specialists. Additional information on the course at Fort Benjamin Harrison can be obtained by calling the course director at autovon 699-7869 or commercial (317) 543-7869.

CLE News

1. Postponement of Second CLAMO Symposium.

The Second Center for Law and Military Operations (CLAMO) Symposium, which was scheduled for 8-10 May 1991 at The Judge Advocate General's School, Charlottesville, Virginia, has been postponed until the Fall of 1991.

2. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must con-

tact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

3. TJAGSA CLE Course Schedule

1991

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

4. Civilian Sponsored CLE Courses

July 1991

7-12: NJC, Felony Drug Cases, Reno, NV.

9-12: ESI, Competitive Proposals Contracting, Denver, CO.

9-12: FP, Fundamentals of Government Contracting, San Diego, CA.

11-12: UTSL, 4th Annual Valuation of Assets in Bankruptcy Conference, Austin, TX.

14-19: NJC, Constitutional Criminal Procedure, Reno, NV.

21-26: NJC, Current Issues in Civil Litigation, Reno, NV.

23-26: ESI, Negotiation Strategies and Techniques, San Diego, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1991 issue of *The Army Lawyer.*

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.

North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1991 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (703) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD B100211	Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).
*AD A229148	Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).
*AD A229149	Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).
AD B144679	Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD B136218	Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135492	Legal Assistance Consumer Law Guide /JAGS-ADA-89-3 (609 pgs).
AD B141421	Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).
AD B147096	Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).
AD A226159	Model Tax Assistance Program/ JA-275-90 (101 pgs).
AD B147389	Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).
AD B147390	Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

*AD A229781 Legal Assistance Guide: Family Law/ ACIL-ST-263-90 (711 pgs).

*AD 230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

*AD 230991 Legal Assistance Guide: Wills/ JA-262-90 (488 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/ JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).

AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B135459 Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. OTJAG Bulletin Board System

Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/ Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following is a list of TJAGSA publications that currently are available on the OTJAG BBS.

OTJAG BBS—TJAGSA PUBLICATIONS

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
330XALL.ZIP	JA 330, Nonjudicial Punishment Programmed Instruction, TJAGSA Criminal Law Division
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format

JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
YIR89.ZIP	Contract Law Year in Review—1989

3. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@JAgs2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via AUTOVON should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

4. The Army Law Library System.

With the closure and realignment of many Army installations, The Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are Autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

ALLS Materials Available

—West's Education Law Reports, 61 Volumes

Contact: Office of the Staff Judge Advocate
HQ, USA Armor Center and Fort Knox
Fort Knox, KY 40121-5000

Telephone: (502) 624-7414; AV 474-7414

—Comptroller General Decisions, Volume 66

Contact: Office of the Staff Judge Advocate
HQ, USA Chemical & Military Police Centers and Fort McClellan
Fort McClellan, AL 36205-5000

Telephone: (205) 848-5435; AV 865-5435

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